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To the Graduate Council:

I am submitting herewith a thesis written by Robert Wilton Fox entitled "Tilting Copyright Balance: Two Sections of the Digital Millennium Copyright Act and the Progress of Science and Useful Arts." I have examined the final electronic copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Science, with a major in Communication.

Dwight L. Teeter, Major Professor

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Vice Provost and Dean of the Graduate School

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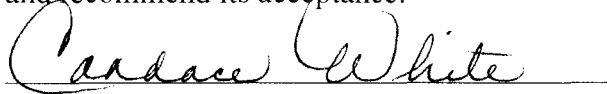
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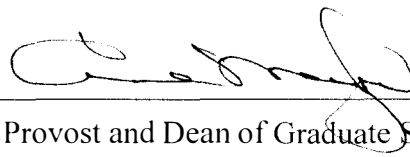


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Tilting Copyright Balance: Two Sections of the Digital Millennium Copyright Act and the Progress of Science and Useful Arts

**A Thesis presented for the Master of Science Degree
The University of Tennessee, Knoxville**

**Robert Wilton Fox
May, 2003**

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Abstract

The Digital Millennium Copyright Act (DMCA) of 1998 was the latest substantial revision of U.S. Copyright Law. Implemented largely as a response to the Internet, the DMCA has become a central target in a struggle over the power of copyright law—a law the first Congress designed in 1790 in keeping with the language of Article I, Section 8 of the Constitution of the United States to promote the “Progress of Science and the useful Arts.” But how is that progress best assured? Increasingly over the years, the promotion of science and useful arts has become a single claim encompassing two diametrically opposed notions, those that guarantee copyright ownership, and those that explicitly limit the scope and power of that ownership. It is the relative power of those countervailing efforts that assures either the success or failure of the law’s purpose. Too little power and creative minds are not given incentive to create. Too much power and the public is restricted from harvesting—and building upon—the knowledge of others.

The DMCA provided a safeguard to protect copyright owners from Internet pirates. But when adding the weight of additional power to copyright owners, did the DMCA tilt the scale away from the progress of science and useful arts? This thesis examines two particular provisions of the DMCA, Section 1201, “Circumvention of copyright protection systems, and Section 512, “Limitations on liability relating to material online.” These provisions are examined in light of the purpose of copyright law as granted by the Constitution of the United States.

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Chapter I: Introduction

The purpose of this thesis is to explore some major ways in which the Digital Millennium Copyright Act of 1998 (DMCA)¹ affects the delicate balance between copyright ownership and the freedom of access to information. To accomplish that objective, this thesis will begin by discussing the constitutional-legal underpinnings of copyright law, comparing theories of intellectual property to current practices as driven by the Digital Millennium Copyright Act of 1998.

It should be noted that this thesis, drawing upon the author's experience as a corporate web manager, started with purely “practical” concerns of effects of the DMCA upon corporate web communicators. It became apparent, however, that with the key sections of the legislation examined here, the DMCA seemed to be at odds with the underpinnings of intellectual property law as expressed in Article I, Section 8 of the Constitution of the United States.² That constitutional provision called for a balance: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Inventions and Discoveries.”

Note also that this thesis is restricted to study of only two parts—Section 512 and Section 1201 of the DMCA. To confine this thesis to manageable size, related pieces of recent copyright legislation—including the copyright-related provisions of

¹ Digital Millennium Copyright Act of 1998. Pub.L.No. 105-304. 112 Stat. 2860.

² Constitution of the United States, Article I, Sec. 8.

the 342-page USA Patriot Act (USAPA)³ and the Cyber Security Enhancement Act of 2001⁴—are not considered here.

The basics are deceptively easy to grasp—filing for copyright, duration of copyright, and what can be copyrighted. All of that is defined by statute, as interpreted by court decisions. That's the easy part, and it may not be all that easy. Copyright law, after all, may be called—in that legal cliché—old wine in new bottles. But the World Wide Web and the Internet are strange and expansive new containers and leakers of content, so some of the old intellectual property law and underlying theories of law sometimes seem to be uneasy concepts in the high-tech world of communication that has grown so explosively since the mid-1980s.

An effort will be made to provide readers of this thesis with some basic appreciation of ways in which copyright law in general applies to the Internet. The main focus of this research, however, will aim at the DMCA, and that involves concepts and theories of intellectual property.

A. A Call to Arms

“When copy machines came on the market, publishers demanded protection; when the VCR got popular, Hollywood was said to be on the chopping block; and the digital audio tape industry, which predated CDs, was wiped out because the music industry was so afraid of pirating, it demanded a tax (translation: advance fine) be attached to the sale of any DAT.”⁵

³ USA Patriot Act, 107th Congress, 1st Sess., H.R. 3162.

⁴ Cyber Security Enhancement Act, 107th Congress, 1st Sess., H.R. 3482.

⁵ Piatt, Mickie Voges, *The aarrrrgh-ument over computer piracy*, by Bryan Rivers, www.eagletribune.com/news/stories/20020606/L1_001.htm, [last visited, April 2, 2003].

By the early 1990s, the Internet was the latest technology to threaten copyright protections. And shortly thereafter, two polarized camps of thought had developed. Those in one camp saw the Internet as a new intrusion on their own security and property rights. This is the camp of the inventors, the writers, the moviemakers, the artists, and the musicians. In this camp, the new possibilities offered by the Internet are tempered by new security threats. A record company sees in the Internet a new form of low-cost marketing possibilities; a way to reach the entire world with the news of new music. At the same time, the same record company struggles with Internet piracy—Information superhighway thieves stealing this new music and delivering it to the world using the very same Internet technology that record companies use to promote their products.

The other camp harbored the fear of losing free access to information. In this camp of educators, librarians, researchers, and philosophers, the Internet was an unprecedented new vehicle for the transmission of ideas, wonderfully devoid of corporate control. If allowed to flourish, the Internet will accelerate “observation, reflection, and experiment.”⁶ If mere thousands were once exposed to an idea, the Internet will ensure that millions will now see it. And these ideas will spawn “Discoveries, Inventions, and Improvements.”⁷

The debate over the freedom of information on the Internet has developed into a full-scale battle. The battle is a philosophical and economic one, pitting the idea of property rights against the advantages of the freedom of information. The property

⁶ See *infra* note 8.

⁷ See *infra* note 8.

rights argument is simple to understand, and at a glance seems logical. When you purchase a home, for example, the home is your property. Similarly, if you write an article, that article is your property. That analogy breaks down, however, when we consider the term of ownership. Home ownership can be arranged to last indefinitely. The ownership of an article, however, represents the ownership of an idea. The ownership of an idea may stifle the evolution of ideas.

Abraham Lincoln made a similar argument in February of 1859, when he attempted to persuade a Jacksonville, Illinois audience of the power that written language has for mankind. What Lincoln said can apply to the Internet as just the latest improvement in the evolution of communication:

Writing -- the art of communicating thoughts to the mind, through the eye -- is the great invention of the world. Great in the astonishing range of analysis and combination which necessarily underlies the most crude and general conception of it -- great, very great in enabling us to converse with the dead, the absent, and the unborn, at all distances of time and of space; and great, not only in its direct benefits, but greatest help, to all other inventions. Suppose the art, with all conception of it, were this day lost to the world, how long, think you, would it be, before even Young America could get up the letter A. with any adequate notion of using it to advantage? ...⁸

The Internet, Lincoln might argue, remarkably ensures that great, and vile, ideas are accessible to even more people, and the evolution of ideas may benefit from this communication tool.

The Internet has introduced new challenges to the world. Improved features are outpacing the system's bandwidth capabilities even when some parts of the world

⁸ Lincoln, Abraham. from his speech *Discoveries and Inventions*, delivered February 11, 1859, in Jacksonville, Illinois. Cited from showcase.netins.net/web/creative/lincoln/speeches/discoveries.htm [last visited February 15, 2003].

are still not “online.” Different technologies for improved performance are jockeying for position—the race among satellite downlinks, dial-up access, cable modems, and fiber-optics, and the relative efficiency of each, has not as yet produced a clearly decisive standard for linking to the World Wide Web. Less conspicuous than the advancing technology, the law also is evolving to try to meet these new cyberspace challenges.

B. Theory and Methodology

This study of the initial effects of two major sections of the Digital Millennium Copyright Act of 1998 uses traditional approaches of legal research and legal history. Theory, in the specialized lexicon of this study, is used to mean constitutional principles of copyright law as interpreted by courts and by scholars of constitutional and intellectual property law. Textual analysis of arguments made by legislators during hearings leading to the passage of the DMCA was also useful here. Analysis is offered of Sections 512 and 1201 of the DMCA. Those DMCA sections, as enacted by Congress and signed into law by President Bill Clinton, are analyzed. This thesis attempts to outline the tensions involved in balancing the paired interests embedded in the Copyrights and Patents Clause of the Constitution of the United States. Efforts to find that uneasy balance point in Congress and in court decisions dealing with DMCA provisions between 1998 and 2003 are the concerns of this study.

Chapter II: Finding the ‘Spirit’ of the U.S. Copyright Act

The history of copyright has been an interplay between ‘new conditions and purposes’ and ‘mischievous’ technology, with law and social understanding repeatedly interacting in novel patterns.⁹

In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA), the latest amendment to the nation’s often-amended Copyright Law. This body of law—one of the oldest pieces of legislation in the history of the United States—was passed in 1790 (before the Bill of Rights was even proposed in Congress and well before the Bill of Rights was finally ratified on December 15, 1791). The DMCA was “Congress’s response to the ostensible plight of copyright owners, faced, they argued, with ruin by the prospect of massive infringement of digital information products.”¹⁰ In this case, “digital information products” meant the Internet, and more pointedly, the ease of mass copying enabled by the Internet.¹¹

The Copyright Act has seen numerous changes, usually in response to technological advancements.¹² And some of those advancements, like the Internet,

⁹ Lawrence, John Shelton, and Bernard Timberg, *Fair Use and Free Inquiry*, Ablex Publishing Corporation, Norwood, New Jersey, pg. 4 (1989).

¹⁰ Zimmerman, Diane Leenheer, *Adrift in the Digital Millennium Copyright Act: The Sequel*, University of Dayton L. R., Vol. 26, No. 2, pg 279 (2001).

¹¹ Teeter, Dwight L., and Bill Loving, *Law of Mass Communications: Freedom and Control of Print and Broadcast Media*, 10th ed., Foundation Press, New York, pg. 852 (2001).

¹² Some of the U.S. Copyright amendments in response to technological advancements include, 1790 books, maps and charts protected; 1802, designs, engravings and etchings added; 1831, musical compositions added; 1856, rights of performance of dramatic works added; 1865, photographs and negatives added; 1870, paintings, statues and other fine arts added, right to translate or dramatize granted to author; 1909, rights of performance amended to include jukeboxes; 1912, motion pictures added; 1952, public performances for profit and recording of nondramatic literary works added to author’s rights; 1976, copyright law amended to cover original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aide of a machine or device. Exceptions include works of industrial design and type faces, from Loyola University Chicago.

have also enabled new capabilities in mass copying. As copying becomes increasingly inexpensive and effective, copyright owners fear a loss of control of their own work. Likewise, society fears mass piracy will remove incentives for the nation's best minds to explore intellectual and creative frontiers.

The DMCA established new law that is designed to protect the copyright owner from illegal piracy on the Internet. The Internet is a particularly potent threat to copyright owners because the technology is digital, and copying material is considered far more effective than it has been with previous technological advancements such as VCRs or audio cassette recorders. The Internet enables users to download text, photographs, movies, music, or graphics with virtually no degradation in quality. Furthermore, users could duplicate these files by the millions in short periods of time and still without significant effect on quality. Finally, the Internet also provided any lay person with an inexpensive, worldwide network, enabling not only mass copying, but also mass distribution.

Congress sought to protect copyright owners from the new threat by enacting the DMCA. But in effort to protect the copyright holder, did the DMCA go too far? Since the enactment of the DMCA, a host of critics have decried the legislation as suffering from unfocused overbreadth. Put another way, did Congress protect Article I, Section 8 of the Constitution at the expense of the First Amendment?

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

Copyright Highlights, <http://www.luc.edu/resources/copyright/highlights.html>, [Last visited April 14, 2002].

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹³

Furthermore, the spirit of copyright law has historically considered the encouragement of property owners with the cross-fertilization of new development in arts and sciences.¹⁴ This thesis examines some of the contested issues within the DMCA. Of central importance is the DMCA's upholding of the critical copyright balance. Does the DMCA uphold the original spirit of U.S. copyright law?

There are two sections of the DMCA that warrant particular attention, and it is those two sections that are covered in this thesis. First, Section 1201, *Circumvention of copyright protection systems*, addresses electronic security devices that are used to protect copyrighted material on the Internet.¹⁵ These devices are often used to prevent unauthorized access to material—electronic books, music, pictures, movies, or any copyrighted material. Section 1201 of the DMCA explicitly makes it illegal to “circumvent”—or break into, or avoid, or disable—any security devices that protect copyrighted material.

Second, Section 512, *Limitations on liability relating to material online*, addressed the role of Internet service providers and online service providers in regards to potential copyright infringement liability.¹⁶ Section 512 allows ISPs and OSPs to take advantage of legal “safe harbors,” where taking proper action when

¹³ U.S. Constitution, Amendment 1.

¹⁴ Nimmer, Melville B., *Nimmer on Copyright*, Vol. 10. Lexis Nexis (2002). Phillip Wittenberg, *The Law of Literary Property* (New York: World Publishing Co., 1957), pp. 45-456.

¹⁵ 17 U.S.C. § 1201.

¹⁶ 17 U.S.C. § 512.

confronted with copyrighted material on their sites—as prescribed by the DMCA—can alleviate liability concerns for service providers.

Both sections have been met with a fair share of criticism, much of it concerning the potential threat these provisions may make on fair use and First Amendment privileges. In addition, critics suggest that these two provisions tilt copyright balance in favor of the copyright industry and to the detriment of the spirit of copyright law.

A. The Spirit of Copyright

Copyright law was first enacted in the United States of America in 1790. Since that time, it has been continuously updated, rewritten, manipulated, and amended in an effort to address new and never-before-thought-of applications of the law, most often as a result of technological advancements.¹⁷ With all of that change in copyright law, the one constant seems to be the spirit of the law itself.

The men who sat in the first Congress of the United States borrowed substantially from the English when enacting copyright legislation. But fortunately for the Americans, the English had first advanced and refined their own concept of copyright law before the United States adopted it. The English had enjoyed copyright protection for centuries, although the purpose initially was more about royal censorship than protection of authors' royalties.¹⁸ Parliament implemented copyright as far back as the 15th Century, some two hundred years before the Americans

¹⁷ See generally, Nimmer, Melville B., *Nimmer on Copyright*, Vol. 10, Lexis Nexis (2002). See also *supra* note 12.

¹⁸ Stewart, Dr. Stephen M., *Two Hundred Years of English Copyright Law*. The American Bar Association, Chicago (1977).

established copyrights. Quite different in spirit from today's copyright laws, the early English laws provided printers with exclusive rights to publish particular documents—laws that did much to promulgate the authorized documents of the monarchy and perhaps not so much for authors of work.¹⁹

With the invention of moveable type, mass copying of material became at once practical and threatening. In 1476, the British crown assigned exclusive licenses to printers, “openly expressing the monarchy’s fears of widespread political and theological heresy.”²⁰ By 1636 English copyright law plainly announced its underlying principal:

That no person or persons whatsover shall presume to print, or cause to bee printed, either in the parts beyond the Seas, or in this Realme... any seditious, scismaticall, or offensive Bookes or Pamphlets, to the scandall of Religion, or the Church, or the Government, or Governours of the Church or State...²¹

Clearly, the 1636 Act was not about protecting printers’ ownership rights. Instead, it was aimed at protecting government from the dangers of unregulated expression. By 1709, the English had significantly updated intellectual property law with the Statute of 8 Anne, which finally provided authors legal right to their own work. But emphasis remained on control, even though the Statue of 8 Anne did pay some attention to establishing “the Encouragement of learned Men to compose and write useful Books.”²²

¹⁹ See *supra* note 9, pg. 5.

²⁰ See *supra* note 9, page 4.

²¹ See *supra* note 9, page 4.

²² Seville, Catherine. *Literary Copyright Reform In Early Victorian England*. Cambridge University Press, page 10 (1999).

“Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families:

For preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books... That from and after the tenth day of April, One thousand seven hundred and ten, the author of any book or books already printed... shall have the sole right and liberty of printing such book and books for the term of one and twenty years.^{2,3}”

It was this law that influenced early citizens of the new republic, encouraging them to seek ways to protect intellectual production. Protecting authors’ rights in order to provide them with proper incentives in order to benefit society through the transmission of knowledge and art was a factor in establishing copyright law, as may be seen in the wording of the enabling provision in the United States Constitution, Article I, Section 8, as quoted above at footnote 5. However, it has not been a foregone conclusion that copyright law by itself will ensure proper incentive to “learned Men.”

Close examination of early copyright debate unearths dichotomous principles. First, copyright law itself is generally regarded as law designed to protect original material from piracy, thereby allowing the producers of the material to earn a profit for their work. With proper incentive in place to generate new material, society at large benefits from increased cerebral production in arts and sciences. However, critics argue that it is copyright protection *itself* that may stifle the advancement of society.

In 1785, Lord Chief Justice Mansfield posed the question of copyright as balancing opposing interests:

“We must take care to guard against the two extremes equally prejudicial; the one that men of ability, who have employed their time for the service of the community may not be deprived of their just merits and reward for their ingenuity and labor; the other that the world may not be deprived of improvements nor the progress of the arts retarded.”²⁴

When the English reexamined their copyright law in 1842, for example, critics of copyright law expressed “genuine fears that a strengthened copyright law would halt the dissemination of knowledge.”²⁵ American lawmakers considered the same conundrum after the 1909 Copyright amendment:

In enacting a copyright law Congress must consider ... two questions: First, how much will the legislation stimulate the producer and so benefit the public, and second, how much will the monopoly granted be detrimental to the public?²⁶

However, this fear of creating a monopolistic beast was less pronounced, or perhaps even unpersuasive when copyright was first considered as a national law in America. In early 1780s America, a young New York schoolteacher had grown unhappy with the only available textbooks on English grammar. America was at war with England, and the already inadequate British books were now becoming scarce. As a result, the enterprising teacher, Noah Webster, penned his own textbook, one

²³ Statute of Anne (8 Anne, c. 19), from Benjamin Kaplan and Ralph Brown, *Cases on Copyright*, The Foundation Press, New York, Appendix G, page 985 (1974).

²⁴ Seltzer, Leon E., *Exemptions And Fair Use In Copyright: The Exclusive Rights Tensions in the 1976 Copyright Act*, Harvard University Press, page 13 (1977), from 1 East 361 n., 102 Eng. Rep. 139 n. 16-18 (K.B. 1785).

²⁵ See *supra* note 22, page 12.

²⁶ See *supra* note 24, page 10.

that encompassed not just grammar but also spelling and reading. When *A Grammatical Institute of the English Language* was nearly complete (it eventually sold millions of copies, 70 million by 1900)²⁷, Webster sought to protect his investment from piracy. But young American law was ill-equipped to protect intellectual property.

Although by the time Webster was finishing his text the United States' Articles of Confederation had been drafted, and no provisions for copyright protection were included.²⁸ The United States was borrowing from some English law, but copyright protection was not currently under congressional consideration--a lack of policy that was very apparent to Webster and some of his contemporaries.

Perhaps influenced by the English Statute of 8 Anne, which turned copyright protection from printers back to writers, Noah Webster appealed for copyright protection in Philadelphia in 1782. With New Jersey and Pennsylvania assemblies out of session, Webster's appeal for general copyright protection was thwarted. After meeting with the New Jersey governor, even state copyright protection seemed unlikely.²⁹

That same year, the British-American writer and philosopher Thomas Paine marked a need for general copyright protection. "It may, with propriety, be remarked, that in all countries where literature is (protected, and it never can flourish where it is not,) the works of an author are his legal property; and to treat letters in

²⁷ Goldstein, Paul. *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, Hill and Wang, New York, pg. 51 (1994).

²⁸ *Ibid.*

²⁹ Bugbee, Bruce W., *The Genesis Of American Patent And Copyright Law*, Public Affairs Press, Washington D.C. pages 106-107 (1967).

any other light than this, is to banish them from the country, or strangle them in the birth.”” Paine went on to appeal for author protection in the new world, which was as yet without a constitution.

“The state of literature in America must one day become a subject of legislative consideration. Hitherto it hath been a disinterested volunteer in the service of the Revolution, and no man thought of profits; but when peace shall give time and opportunity for study, the country will deprive itself of the honour and service of letters, and the improvement of science, unless sufficient laws are made to prevent depredation on literary property. It is well worth remarking, that Russia, who, but a few years ago, was scarcely known in Europe, owes a large share of her present greatness to the close attention she has paid, and the wise encouragement she has given to every branch of science and learning; and we have almost the same instance in France, in the reign of Louis XIV.”³⁰

In this appeal it is worth noting a conspicuous omission of thought. At the time of his writing, Paine surely was considering the English Statute of 8 Anne as a model for future American consideration. Noah Webster must also have been influenced by the English law. However, the Statute of 8 Anne approached the subject of balancing the protection of authorship with the potentially damaging outcome of establishing a monopoly. The English law “hedged its grant of exclusive rights by providing that anyone thinking a book too high priced could bring an action before a tribunal with the power to lower the price and to fine the bookseller.”³¹

Before the copyright was established in general U.S. law, nearly every individual state had adopted its own copyright protections, five of the states based

³⁰ *Ibid*, page 105.

³¹ *See supra* note 24, page 11.

copyright closely on the English Statute of 8 Anne, with “provisions for state controls of access to copyrighted works, or their prices, or both.”³²

Undaunted by early failures to establish protection, Webster shared his textbook manuscript with Samuel Stanhope Smith, the president of Princeton University. Impressed with Webster’s work, and eager to support the encouragement of such projects, Smith wrote a letter of recommendation. “Men of industry or of talents in any way, have a right to the property of their productions; and it encourages invention and improvement to secure it to them by certain laws, as has been practiced in European countries with advantage and success. And it is my opinion that it can be of no evil consequence to the state, and may be of benefit to it, to vest, by a law, the sole right of publishing and vending such works in the authors of them.”³³

Armed with this letter, Webster approached the state of Connecticut, where he was encouraged by news of that state granting Andrew Law personal copyright protection for five years for his collection of songs. Webster addressed the Connecticut legislature.

“I have been indefatigable this winter; I have sacrificed ease, pleasure, and health to the execution of it, and have nearly completed it. But such close application is too much for my constitution. I must relinquish the school or writing grammars. I shall not pursue the plan any further, unless it shall meet with public approbation, encouragement, and security. On the decision, therefore, of these two legislatures [Webster was also applying to the New York Government] depends the further prosecution of my design... An attention to literature must be the principal bulwark against the encroachments of civil and ecclesiastical tyrants, and American Liberty can die only with her *Maecenases*. America must be as independent in literature as she is

³² *Ibid.*

³³ See *supra* note 29.

in Politics, as famous for arts as for arms; and it is not impossible but a person of my youth may have some influence in exciting a spirit of literary industry.”³⁴

In Webster’s, Paine’s and Smith’s letters, we see a general appeal for the protection of authorship and no consideration for the danger of monopoly, as expressed in English law. The need for protecting intellectual pursuit seemed to be paramount.

In January of 1783, Connecticut granted a copyright to Webster, “An Act for the Encouragement of Literature and Genius.” The Act declared “it is perfectly agreeable to the Principles of natural Equity and Justice, that every Author should be secured in receiving the Profits that may arise from the Sale of his Works, and such Security may encourage Men of Learning and Genius to publish their Writings; which may do Honor to their Country, and Service to Mankind.”³⁵ Three months later, America began the task of considering national copyright, led by writers—not booksellers—in a battle for legislation that was more hotly contested whether or not the power of copyright should reside with the states or with the federal government.³⁶

Joel Barlow, a poet and former Yale classmate of Webster’s, may have helped the committee draw an opinion on national copyright.

“[N]othing is more properly a man’s own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce.”³⁷

The committee’s recommendation on May 2 of that year read:

³⁴ See *supra* note 29, pg. 108.

³⁵ *Ibid.*

³⁶ See *supra* note 27, pg. 51.

³⁷ See *supra* note 29, page 113.

“Resolved, That it be recommended to the several states, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their... executors, administrators and assigns, the copyright of such books for a certain time not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the first term mentioned, and to their... executors, administrators and assigns, the copyright of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing and vending the same, to be secured to the original authors, or publishers, or... their executors, administrators and assigns, by such laws and under restrictions as to the several states may seem proper.”

As a recommendation to the states, this was the first known venture of the United States Government into the realm of intellectual property.³⁸ At nearly the same time, Massachusetts followed Connecticut’s lead on March 17.

“Whereas the Improvement of Knowledge, the Progress of Civilization, the public Weal of the Community, and the Advancement of Human Happiness, greatly depend on the Efforts of learned and ingenious Persons in the various Arts and Sciences: As the principal Encouragement such Persons can have to make great beneficial Exertions of this Nature must exist in the legal Security of the Fruits of their Study and Industry to themselves; and as such Security is one of the natural Rights of all Men, there being no Property more peculiarly a Man’s own than that which is produced by the Labour of his Mind: Therefore, to encourage learned and ingenious Persons to write useful Books for the Benefit of Mankind, Be it enacted... That all Books, Treatises, and other Literary Works, having the Name or Names of the Author or Authors thereof printed and published with the same, shall be the sole property of the said Author or Authors, being Subjects of the United States of America, their Heirs and Assigns, for the full and compleat Term of Twenty-one Years, from the Date of their first Publication.”³⁹

Still, pressure to enact general copyright protection did not completely obscure weighing the need for public access. Early copyright provisions included

³⁸ See *supra* note 29, page 113.

³⁹ See *supra* note 29, page 114.

strict guidelines for establishing length of copyright term, an obvious acknowledgement that copyright law could be given too much power.

At the Constitutional Convention, matters turned to issues of intellectual property law on August 18, 1787. James Madison proposed, among other things:

“To secure literary authors their copy rights for a limited time
“To encourage by premiums & provisions, the advancement of useful knowledge and discoveries.”⁴⁰

Charles Pinckney, also a member of the Continental Congress offered:

“To grant charters of incorporation
“To grant patents for useful inventions
“To secure to Authors exclusive rights for a ... certain time.”⁴¹

In The Federalist Papers, Madison described the power of copyright and with it a justification for its prominent placement as a constitutional provision.

“The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain...The public good fully coincides...with the claims of individuals.”⁴²

Clearly, copyright was a considerable need for a new country, a right that would help ensure that America was a front runner in the marketplace of ideas. However, these early pronouncements did little to directly confront the possible danger that an overly powerful copyright law may pose. Beyond copyright term limits, there was little public discourse regarding the balance of copyright power with the right of public access. Over the years, American courts were faced with the problem of balancing these two elements.

⁴⁰ *Madison's Notes, Saturday, August 18, 1787*, www.thisnation.com/library/madison/august-18.html, [last visited March 17, 2003].

⁴¹ *See supra* note 29, page 126.

⁴² Samuels, Edward, *The Illustrated Story of Copyright*, Thomas Dunne Books, St. Martin's Press, pg. 14 (2000).

“In short, we must often in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects, of the original work.”⁴³

“The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings,...but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.”⁴⁴

“Copyright is intended to increase and not to impede the harvest of knowledge...The scheme established by the Copyright Act...foster[s] the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”⁴⁵

“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors...by the provision of a special reward, ad to allow the public access to the products of their genius after the limited period of exclusive control has expired.”⁴⁶

“The primary objective of copyright is not to reward the labor of authors, but ‘To promote the Progress of Science and useful Arts.’ To this end, copyright assures authors the right in their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”⁴⁷

“The copyright law, like the patent statute, makes reward to the owner a secondary consideration. Although the primary purpose of the copyright law is to foster creation and dissemination of intellectual works for public welfare, it also has an important secondary purpose:

⁴³ *Folsom v. Marsh*, 9 F. Cas. 342 [C.C.D. Mass. 1841], from Gretchen McCord Hoffmann, *Copyright in Cyberspace*, Neal-Schuman Netguide Series, New York, page 26 (2001).

⁴⁴ H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909)

⁴⁵ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

⁴⁶ *Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 417, 430-31 (1984).

⁴⁷ *Feist Publication, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991).

To give authors the reward due them for their contribution to society.”⁴⁸

One particular case illustrates especially well this power struggle between copyright protection and fair use. In the early 1960s, Random House hired a writer to create a book-length biography on the life of Howard Hughes, a giant in America’s aviation, oil and motion picture industries. Hughes, a devoutly private man, protested the writing of the biography, suing Random House for copyright infringement, claiming he had “prima facie” copyright ownership of the story. To substantiate that claim, just five days earlier Hughes had bought *Look* magazine articles that were published years before on Hughes’ life. With that purchase, Hughes attempted to claim copyright ownership of the story of his life, arguing he “owned” the copyright to the story, effectively stopping anyone from writing the story again. On the other hand, Random House argued that writing the Hughes story amounted to fair use of factual information. And after a trial court and a district court found in favor of Hughes, a Circuit Court of Appeals agreed with Random House. Circuit Judge Leonard P. Moore, speaking for the Circuit Court of Appeals noted,

“...there can be little doubt that portions of the Look article were copied. Two direct quotations and eight-line paraphrase were attributed to Stephen White, the author of the articles. A mere reading of the Look articles, however, indicates that there is considerable doubt as to whether the copied and paraphrased matter constitutes a material and substantial portion of those articles.

Furthermore, while the mode of expression employed by White is entitled to copyright protection, he could not acquire a monopoly in the narration of historical events.”⁴⁹

⁴⁸ See *Supra* note 24, pg. 14. from Register of Copyrights. 87th Cong., 1st Sess., *Copyright Law Revision*. Report on the General Revision of the U.S. Copyright Law 5 (House Judiciary Comm. Print 1961).

⁴⁹ See *supra* note 11, pg. 857-858.

With the landmark 1976 Copyright Act, copyright law had achieved a monumental change in language. For the first time, the American Copyright Act acknowledged the balance between protection of authorship and freedom of access to information.

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified [by Section 106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.⁵⁰

The Act was met with some criticism,⁵¹ but clearly the legislation did not inject new policy so much as it substantiated that copyright itself was a struggle between author reward and public access to information.

The purpose of copyright has been debated as either a guarantee of incentive for creativity, or a means for promoting the “Progress of Science and Useful Arts.”⁵² The two concepts are probably not mutually exclusive. However, one can argue that copyright law is both a savior and a detriment to creativity.

Certainly if creative work is pirated and distributed without benefit to the creator, then the introduction of new creativity is threatened. However, consider the possibility that copyright law itself has extinguished creativity that has been inspired by some previous creation. For example, Walt Disney recently lobbied to extend

⁵⁰ Oler, Harriet L., *Copyright Law and the Fair Use of Visual Images*, Ch. 21, page 272 of *Fair Use and Free Inquiry*,” Edited by John Shelton Lawrence and Bernard Timberg, Ablex Publishing Corporation, New Jersey (1980).

⁵¹ See *supra* note 24. As Seltzer claimed, “The notion of fair use demarcates a territory for debate among conflicting interests. rather than providing a ready means for resolving them.”

⁵² See *supra* note 47.

copyright protection for some of its characters.⁵³ Nearing the end of its copyright protection on several characters including Steamboat Willie, Pluto, Goofy, and Donald Duck, Disney acted to protect its cash cattle. “Rather than allow Mickey and friends to enter the public domain, Disney and *its* friends—a group of Hollywood studios, music labels, and PACs representing content owners—told Congress that they wanted an extension bill passed.”⁵⁴ Congress *did* pass the Sonny Bono Copyright Term Extension Act ⁵⁵ (upheld in *Eldred v. Ashcroft*) granting the term of protection “by 20 years for works copyrighted after January 1, 1923. Works copyrighted by individuals since 1978 got ‘life plus 70’ rather than the existing ‘life plus 50.’ Works made by or for corporations (referred to as ‘works made for hire’) got 95 years. Works copyrighted before 1978 were shielded for 95 years, regardless of how they were produced.”⁵⁶

This kind of seemingly perpetual fortress of copyright law may do as much damage to the encouragement of creativity as it does to protect it. Imagine if new characters or new stories were developed (or could have already been developed) using Mickey as inspiration or as a starting point. The overwhelming popularity of the Walt Disney company almost assures that any new general-appeal children’s theme will have a virtually insurmountable challenge to overcome Walt Disney’s monopoly.

⁵³ *Eldred v. Ashcroft*, 239 F. 3d 372 (2003).

⁵⁴ Sprigman, Chris, *The Mouse That Ate The Public Domain: Disney, The Copyright Term Extension Act, And Eldred v. Ashcroft*, writ.news.findlaw.com/commentary/20020305_sprigman.html (March 5, 2002), [last visited April 2, 2003].

⁵⁵ 17 U.S.C. § 101, The Sonny Bono Copyright Term Extension Act.

⁵⁶ See *supra* note 54.

Granted, Disney has achieved success because of its own contribution to creative genius. But copyright law in perpetuity may in fact now stifle new creative genius, due in part to Disney's domination of the genre.

The desire to achieve improved society through intellectual contribution is the task of copyright law. That task is achieved by guaranteeing proper balance between the protection needs of authors, and the guarantee of freedom of information for the public. With the coming popularity of the Internet, copyright law again faced amendment. How has the latest round of copyright evolution considered this balance of power?

Chapter III: Birth of the Digital Millennium Copyright Act

The DMCA was the U.S. Congress' answer to the danger that digital media posed to copyright law.⁵⁷ But the DMCA was not a sudden amendment built from scratch. It has roots much deeper than the Spring 1998 Senate hearings.⁵⁸ Some of the amendments found in the DMCA can be traced back to the early 1990s.

In February 1993, the Clinton Administration responded to the growth of the Internet when it formed the Information Infrastructure Task Force (IITF) "to implement the Administration's vision for the National Information Infrastructure (NII)."⁵⁹ For simplification, "NII" refers almost exclusively to the Internet, as noted in the IITF report.⁶⁰ The IITF worked with "the private sector, public interest groups, Congress, and State and local governments to develop comprehensive telecommunications and information policies and programs that will promote the development of the NII and best meet the country's needs."⁶¹

This preliminary investigation led to the formation of a Working Group on Intellectual Property Rights, Chaired by Bruce Lehman, Assistant Secretary of

⁵⁷ Senator John Ashcroft (R-MO), Senate floor debate on S. 2037, the Digital Millennium Copyright Act (May 14, 1998): "This legislation (the DMCA) is about updating the copyright laws for the digital age and preparing a sizable portion of our economy for the next century."

⁵⁸ U.S.C.C.A.N. 105th Cong., 2nd S. (1998).

⁵⁹ *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Chair, *Information Infrastructure Task Force*, Ronald H. Brown, Secretary of Commerce, Chair, Sept. 1995. The NII could now be more aptly named the GII (Global Information Infrastructure) as predicted by former Vice President Al Gore in Remarks Prepared for Delivery at the International Telecommunications Union in Buenos Aires, Argentina (March 21, 1994).

⁶⁰ "The 'National Information Infrastructure' as it is discussed in this Report, encompasses digital, interactive services now available, such as the Internet...[A] currently functioning structure lends itself more readily to legal analysis than a hypothetical construct based on future developments." The IITF report also reserves the notion that NII could apply to technology "contemplated for the future."

⁶¹ *Ibid.*

Commerce and Commissioner of Patents and Trademarks Chair.⁶² The Working Group began evaluating these special interest groups in the fall of 1993, in which it invited testimony regarding the NII through a public hearing and solicited feedback.⁶³ From those responses, the Working Group released a draft “Green Paper” in the summer of 1994, which was distributed by the thousands in paper form and on the IITF Internet site. In response to the Green Paper, the Working Group received nearly a half million individual comments by the following fall.

The Working Group outline of Internet potential did not overlook the need to maintain public access to information. In September of 1994, the Working Group sponsored a “Conference on Fair Use” (CONFU), which allowed both copyright owners as well as users of copyrighted works to discuss fair use. In addition, the report acknowledged the need for the NII to support education systems and distance learning. In particular detail, the report recognized, among other things, the Internet’s potential to increase health care awareness for both patients and health care professionals.

But while acknowledging these fears, the report simultaneously predicted the failure of the copyright industry to use the Internet, predicting, for example, that authors will be “wary” of entering the Internet market for fear of piracy. They also conceded that this piracy is not eliminated by a copyright owner’s refusal to distribute

⁶² Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Chair, 1992-1998.

⁶³ A “wide variety” of contributors to the discussion regarding development of the report included “various electronic industries, service providers, the academic, research, library and legal communities, and individual creators, copyright owners and users, as well as the computer software, motion picture, music, broadcasting, publishing and other information and entertainment industries.” IITF Report, page 5.

his work online. Any unauthorized uploading of the work will result in the same piracy. This, the report reasoned, could severely limit the growth of the Internet. In a bold assertion that tied Internet success or failure to U.S. legislation, the report claimed “The public will not use the services available on the NII and generate the market necessary for its success unless a wide variety of works are available under equitable and reasonable terms and conditions, and the integrity of those works is assured.”⁶⁴

After a substantial review of the NII as it stood in 1995, the Report outlined various recommendations for updating copyright law. Four of these recommendations deal specifically with the topic of this thesis. These same four recommendations would eventually receive a spot in the Digital Millennium Copyright Act.⁶⁵

1. 1201 Circumvention of Copyright Protection Systems.
No Person shall import, manufacture or distribute any device, product, or component incorporated into a device or product, or offer or perform any service, the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent, without the authority of the copyright owner or the law, any process, treatment, mechanism or system which prevents or inhibits the violation of any of the exclusive rights of the copyright owner under Section 106.
2. 1202 Integrity of Copyright Management Information.
 - a. No person shall knowingly provide copyright management information that is false, or knowingly publicly distribute or import for public distribution copyright management information that is false.
 - b. No person shall, without authority of the copyright owner or the law, (i) knowingly remove or alter any copyright management information, (ii) knowingly distribute or import for distribution copyright management information that has been altered without authority of the copyright owner or the law, or (iii) knowingly distribute or import for distribution copies or phonorecords from which copyright management information has been removed without authority of the copyright owner or the law.
 - c. As used in this chapter, “copyright management information” means the name and other identifying information of the author of a work, the name and other

⁶⁴ See *supra* note 59.

⁶⁵ 17 U.S.C § 1201, 1202, 1203, and 1204.

identifying information of the copyright owner, terms and conditions for uses of the work, and such other information as the Register of Copyrights may prescribe by regulation.

3. 1203 Civil Remedies.

Any person injured by a violation of Sec. 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.

4. 1204 Criminal Offenses and Penalties.

Any person who violates Section 1202 with intent to defraud shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both.⁶⁶

In addition, the report made two recommendations that are also particularly relevant to this thesis, “library exemptions,” or rights of access to copyrighted works for fair use, and “technological protection,” which did in fact result in a substantial amendment to the Copyright Act.

Under “library exemptions,” the Working Group Report cited Section 108 of the 1976 Copyright Act claiming it “clearly did not permit digital reproduction” as a form of Fair Use.⁶⁷ However, the Report urged expansion of Fair Use to include digital copying by libraries “under certain circumstances.”

The Working Group asked Copyright Act lawmakers:

1. To accommodate the reality of the computerized library by allowing the preparation of three copies of works in digital form, with no more than one copy in use at any time (while the others are archived);
2. To recognize that the use of a copyright notice on a published copy of a work is no longer mandatory; and
3. To authorize the making of digital copies for purposes of preservation.

Under “technological protection,” the report recommended “the prohibition of devices, products, components and services that defeat technological methods of preventing unauthorized use is in the public interest and furthers the Constitutional purpose of copyright laws.” An important caveat, however, allowed anyone to protect

⁶⁶ See *supra* note 59.

their work with security devices, regardless of fair use provisions. “The fair use doctrine does not require a copyright owner to allow or to facilitate unauthorized access or use of a work,” the report explained. “If the circumvention device is primarily intended and used for legal purposes, such as fair use, the device would not violate the provision, because a device with such purposes and effects would fall under the “authorized by law” exemption.”⁶⁸

The need for copyright protection also was recognized outside the United States. In 1996, the World Intellectual Property Organization (WIPO)—“an international organization dedicated to promoting the use and protection of works of the human spirit”⁶⁹—convened to resolve new copyright challenges.⁷⁰ “Production centres [sic] such as the European Union and the United States proposed that the conference...deal with the challenges of digital technology.”⁷¹ The conference, held in Geneva, Switzerland, resulted in two treaties, the “WIPO Performances and Phonograms Treaty,” and the “WIPO Copyright Treaty.” Both were liberally adopted in the DMCA, but the latter “Copyright Treaty” contained recommendations that ultimately affected the issues discussed in this thesis.

Interestingly, much of the WIPO recommendations in this section were quite similar to the NII Working Group Report, described above. It was, after all, the United States that “proposed that digital transmissions be included within the scope of

⁶⁷ “Under this exemption, for example, a repository could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in ‘machine-readable’ language for storage in an information system.” H.R. at 75, U.S.C.C.A.N. 5689; Senate Report at 67.

⁶⁸ See *supra* note 59.

⁶⁹ *About WIPO*, www.wipo.org/about-wipo/en/ [last visited April 15, 2003].

⁷⁰ Arup, Christopher, *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property*, Cambridge University Press, page 274 (2000).

a distribution right, as it had proposed to do within its own new national model.”⁷²

This recommendation most assuredly came directly from the Working Group Report, completed only months earlier.

After exposing the NII Report to the international community at the WIPO conference, attention turned back to amending U.S. Copyright Law in accordance with the recommendations in the Report. In September 1997, Bruce Lehman participated in two days of hearings designed to invite testimony regarding the proposals in the WIPO conference treaties.⁷³

In May of 1998, Representative Howard Coble⁷⁴ submitted the “WIPO Copyright Treaties Implementation and Online Copyright Infringement Liability Limitation” report to the Committee on the Judiciary. The report outlined various

⁷¹ *Ibid.* page 276.

⁷² *Ibid.*

⁷³ The hearings included a wide variety of participants including Marybeth Peters, Register of Copyrights; Roy Neel, CEO, United States Telephone Assoc; Jack Valenti, CEO, Motion Picture Association of America; Robert Holleyman, President, Business Software Alliance; M.R.C. Greenwood, Chancellor, University of California, Santa Cruz on behalf of the Association of American Universities and Land Grant Colleges; Tushar Patel, Vice President and Managing Director, USWeb; Lawrence Kenswil, Executive Vice President, Business and Legal Affairs, Universal Music Group; Marc Jacobsen, General Counsel, Prodigy Services, Inc; Ken Wasch, President, Software Publishers Association; Ronald G. Dunn, President, Information Industry Association; John Bettis, Songwriter, on behalf of the American Society of Composers Authors and Publishers; Allee Willis, Songwriter, on behalf of Broadcast Music, Inc; Robert L. Oakley, Professor of Law, Georgetown University Law Center and Director, Georgetown Law Library, on behalf of a Coalition of Library and Educational Organizations; Johnny Cash, Vocal Artist, with Hilary Rosen, President and CEO, Recording Industry Association of America; Allan Adler, Vice President, Legal and Governmental Affairs, Association of American Publishers; Gail Markels, General Counsel and Senior Vice President, Interactive Digital Software Association; Mike Kirk, Executive Director, American Intellectual Property Law Association; Thomas Ryan, President, SciTech Software, Inc; Mark Belinsky, Vice President, Coy Protection Group, Macrovision, Inc; Douglas Bennett, President, Earlham College, Vice President, American Council of Learned Societies, on behalf of the Digital Future Coalition; Edward J. Black, President, Computer and Communications Industry Association; Christopher Byrne, Director of Intellectual Property, Silicon Graphics, Inc, on behalf of the Information Technology Industry Council; and Gary Shapiro, President, Consumer Electronics Manufacturer’s Association (a sector of the Electronic Industries Association), and Chairman, Home Recording Rights Coalition.

⁷⁴ U.S. Representative Howard Coble, (R-NC), member of the subcommittee on Courts, the Internet, and Intellectual Property.

recommendations for updating the Berne Convention and improving copyright protection to meet the digital environment.

Although the report acknowledged the need for maintaining a balance in copyright power, clearly the initiative of the proposed legislation was weighted in favor of protecting investment in the Internet—thereby encouraging the Internet’s growth and usefulness. For example, the report’s premise was based upon the digital environment’s capability to allow users to “send and retrieve perfect reproductions of copyrighted material easily and nearly instantaneously...” But this potential benefit also was a clear and present threat, as recognized in the report’s pronouncement “[rapid reproduction] will unfortunately also facilitate pirates who *aim to destroy the value of American intellectual property*.”⁷⁵

The report outlined the need to outlaw anti-circumvention technology in order to curtail piracy, reasoning that much of the Internet’s copyright material will be protected by security devices to prevent unauthorized copying and distribution. The proposed legislation would make it illegal to circumvent that security technology in order to gain access to copyrighted material. The report also acknowledged that anti-circumvention legislation must be approached cautiously, for fear of over-reaching. “While there are no objections to preventing piracy on the Internet, it is not easy to draw the line between legitimate and non-legitimate uses of decoding devices, and to account for devices which serve legitimate purposes.”⁷⁶ To avoid that over-reaching, the report made illegal only devices “that (1) are primarily designed to grant free,

⁷⁵ *WIPO Copyright Treaties Implementation and Online Copyright Infringement Liability Limitation*, Rept. 105-551, P.1 H.R. 2281, page 9 (emphasis added).

⁷⁶ *Ibid.*, page 10.

unauthorized access to unauthorized works; (2) have only limited commercially significant purpose or use other than to grant such free access; and (3) are intentionally marketed for use in granting such free access.”⁷⁷

The report also addressed the need for limiting the liability of online service providers, establishing a clear difference between direct infringement and secondary liability. In an illustrative explanation, the report agreed with and “codified” the finding in *Religious Technology Center v. Netcom*.⁷⁸ In that case, the Religious Technology Center owned copyright to work by L. Ron Hubbard, the late founder of the Church of Scientology. Dennis Erlich, a former minister of the Church of Scientology who became a bitter critic of the cult, posted some of Hubbard’s material on his own web site, alt.religion.scientology. To publish his site, Erlich used Netcom, an Internet Service Provider. After failing to convince Erlich to remove the material from his site, Religious Technology Center wrote a letter to Netcom asking them to pull the plug on alt.religion.scientology. Netcom asked for proof that the work was, in fact, copyright protected. When Religious Technology Center refused to provide proof, Netcom refused to pull the plug on Erlich’s site. In the end, the court found in favor of Netcom, citing the need for plaintiffs to prove the existence of copyright.

While the WIPO report was being developed, so was the DMCA. Floor statements involving content that would eventually become the DMCA began on July 29, 1997.⁷⁹ On the very same day, the text of H.R. 2281 (the DMCA) were introduced

⁷⁷ *Ibid.*

⁷⁸ *Religious Technology Center v. Erlich*, 907 F. Supp. 1361 (N.D. Cal. 1995).

⁷⁹ S.1121, *WIPO Copyright and Performances and Phonograms Treaty Implementation Act* (July 29, 1997).

on the House floor.⁸⁰ Over the course of the ensuing fifteen months, the Act went through surprisingly few changes. Of note are the differences between the House and Senate versions of the bill. One such difference falls under the anti-circumvention language, Section 1201. Again, the anti-circumvention provision was designed to outlaw the act of circumventing security devices that are designed to protect copyrighted works. However, Section 1201 did *not* specifically address the use of copyright protected work once circumvention has taken place. For that, the Senate report clearly explained that any action regarding specific misuse of the work would fall to “the protections embodied in Title 17” and *not* Section 1201 of the DMCA. By contrast, the House report did not clarify this distinction.

This seemingly trivial difference was made more prominent by Gary J. Shapiro in a hearing before a subcommittee of the House the following June.⁸¹ In that hearing, Shapiro, president and CEO of the Consumer Electronics Association, blasted some of the DMCA language for being imprecise and for what he described as disguising legislative actions against technology as copyright enforcement.⁸² As the Senate report explained, Section 1201 is not actionable as a copyright infringement provision. Instead, it outlaws devices used for *circumventing* copyright protection. Therefore, according to Shapiro, fair use of copyrighted material is made

⁸⁰ H.R. 2281, WIPO Copyright Treaty Implementation Act (July 29, 1997).

⁸¹ Statement of Gary J. Shapiro, president and CEO of the Consumer Electronics Association, before the Subcommittee on Telecommunications, Trade and Consumer Protection Committee on Commerce, United States House of Representatives (June 5, 1998).

⁸² *Ibid.* In his report, Shapiro said “While it may have originated in the Judiciary Committee, this legislation is not really about copyright. While amending Title 17 of the U.S. Code, the bill does not amend the Copyright Act, and the acts prohibited by its terms are not tied to infringement of copyrights.”

impossible, because the devices required to access the material in the first place are illegal.

Another noteworthy difference between the House and the Senate reports is found in the Senate report's Section 1201 paragraph (d)(3)—no such paragraph is found in the House report. That paragraph explains that “nothing in Section 1201 creates a mandate requiring manufacturers of consumer electronics, telecommunications, and computing products to design their products or their parts and components to respond to any particular technological measure employed to protect a copyrighted work.”⁸³ The absence of this paragraph in the House report may have contributed to Shapiro's remarks. He testifies that “[the bill] would make designers of new devices, such as computers and VCRs, as well as high definition television sets and set top boxes, responsible for responding to and implementing any and all technical anti-copy measures chosen by anyone who transmits a signal or distributes a program.”⁸⁴ Either Shapiro was unaware of this qualifying statement in paragraph (d)(3), or he found it legally unsubstantial. To frame this debate in an example, suppose a cable television station transmitted its signal in a scrambled format. Only subscribers to that cable station could receive the signal unscrambled through technology provided by the cable station. Suppose also, that a new television manufacturer built a set that just so happened to descramble that cable station's signal. Would the television manufacturer be liable under the DMCA Section 1201?

⁸³ R. 105-190, 105th Cong., 2d Sess., § 1201 (d)(3). Senate Report, The Digital Millennium Copyright Act of 1998 (May 11, 1998).

⁸⁴ See *supra* note 81, page 4.

The Senate report paragraph (d)(3) seems to exonerate the TV manufacturer.

However, Shapiro claims the manufacturer would in fact be liable under 1201.

In summary, Shapiro recommended three changes to the DMCA:

1. Clear language stating that the bill does not mandate that a product respond to any particular technological protection measure.
2. A definition of 'technological protection measure' that works in the real world. Shapiro proposed two solutions, the encryption/scrambling/secure watermark approach in H.R. 3048; or a measure developed through a consensus-based process involving all interested parties.
3. An exemption for both product manufacturers and product servicers to allow them to adjust products so as to mitigate noticeable adverse effects on the authorized performance or display of a work, where such effects are caused by a technological protection measure.

Just one of Shapiro's recommendations reached the resulting hearings on the DMCA on July 22, 1998. The amendment, presented by Representative Cliff Stearns (R-FL), "to provide for a process to define the term technological protection measure," was withdrawn by unanimous consent.⁸⁵

The Digital Millennium Copyright Act was signed into law October 28, 1998.⁸⁶ In its final form, the DMCA fills 59 pages and covers five subtitles.⁸⁷ Lawmakers seemed to perceive the Internet largely as untamed territory, ripe for exploitation by pirates. At the same time, lawmakers acknowledged the need for a balanced approach to copyright legislation. President Bill Clinton, expressed that sentiment when he signed the Act on November 2, 1998, saying "[Internet]...technologies...make it possible to pirate copyrighted works on a global

⁸⁵ H. Rept. 105-551 (part II), Report of the House Commerce Committee on H.R. 2281, The Digital Millennium Copyright Act (July 22, 1998).

⁸⁶ Digital Millennium Copyright Act, Pub.L.No. 105-304, 112 Stat. 2860.

⁸⁷ 17 U.S.C. § 201, the Digital Millennium Copyright Act includes, Title I, WIPO Treaties Implementation; Title II, Online Copyright Infringement Liability Limitation; Title III, Computer

scale with a single keystroke. The WIPO treaties set clear and firm standards...This Act implements those standards, carefully balancing the interests of both copyright owners and users.”⁸⁸

In researching the DMCA in light of the historical spirit of copyright law, this thesis is primarily concerned with two sections of the Act. Title I, Chapter 12 “Copyright Protection and Management Systems” is the final version of the recommendations in the NII Working Group’s Report, as discussed above, including Section 1201. Also of interest, Title II “Online Copyright Infringement Liability Limitation,” which relieves Internet Service Providers (ISPs) of contributory copyright infringement liability in certain circumstances that are spelled out in the Section. According to John Ashcroft, then a Republican Senator from Missouri, “Make no mistake about it, clarification of on-line service provider liability was one of my fundamental concerns in the debate...”⁸⁹

Perhaps the most criticized Section of the DMCA is 1201, the anti-circumvention measure.⁹⁰ As discussed in both the Senate and House hearings, Section 1201 addresses security devices used on the Internet that restrict access to , data, requiring proper procedure to gain access—be it registration, paying a fee, or

Maintenance or Repair Copyright Exemption: Title IV. Miscellaneous Provisions; and Title V. Protection of Certain Original Designs.

⁸⁸ U.S.C.C.A.N. 105th 2d Sess., P.L.105-304. Statement by President William J. Clinton Upon Signing H.R.2281, November 2, 1998.

⁸⁹ Senator John Ashcroft (R-MO). Senate floor debate on S. 2037, the Digital Millennium Copyright Act (May 14, 1998).

⁹⁰ Van Den Elzen, Ryan L., *Decrypting the DMCA: Fair Use as a Defense to the Distribution of DeCSS*. Notre Dame Law Review, Vol. 77, No. 2, page 673 (2002); Brannan, Anna Claveria, *Fair Use Doctrine and the Digital Millennium Copyright Act: Does Fair Use Exist under the DMCA?*, Santa Clara Law Review, Vol. 42, No. 1, page 247 (2001); Fox, Adam R., *The Digital Millennium Copyright Act: Disabusing the Notion of a Constitutional Moment*, Rutgers Computer & Technology L.J. Vol. 27 (2001).

some other requirement. For example, U.S. software company Adobe Systems developed an “E-Book Reader,” a device that allows a user to read an electronic book from a computer or handheld device. The software was free, but was required in order to read an electronic book. The software also restricted the uses of an electronic book, preventing copying or file sharing. In early 2001, a Russian software company called ElcomSoft developed the Advanced E-Book Processor (AEBPR), which enabled a user to convert electronic book files into unprotected PDF files.⁹¹ That “anti-circumvention” device was exactly the type of device that the DMCA sought to control.

The law provides protection for copyright owners who put their work online and use security software or devices to protect that work from piracy. Section 1201(a)(1)(A) reads “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”⁹² Even as members of Congress debated the “anti-circumvention” measure, the possibilities of over-protecting copyright owners must have weighed heavily on them. How else to explain the subsets (B), (C), (D) and (E), which effectively water down the statement made in (A)? Trouble arose when lawmakers considered fair use provisions to copyright protection. Section 1201(B) reins in the power of (A). “The prohibition contained in subparagraph (A) shall not apply to persons who are...adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that ...work.”⁹³

⁹¹ *United States of America, v. Elcom Ltd. and Dmitry Sklyarov*, 203 F. Supp. 2d 1111, 2002, charges dropped in January 2003.

⁹² 17 U.S.C. § 1201(a)(1)(A)

⁹³ 17 U.S.C. § 1201(a)(1)(B)

But lawmakers were concerned with the lasting effect of 1201(a)(1)(A). Would anti-circumvention provisions severely affect noninfringing uses on the Internet? For Congress, the solution to that problem was vexing enough to pass it on to the Librarian of Congress and the Copyright Office. Known as the “fail safe” provision, it would be up to the Librarian to determine whether or not the anti-circumvention language was too far-reaching.⁹⁴ What’s more, the Librarian could designate whole classes of information as legally accessible to anyone for noninfringing purposes despite security software protecting that work. The Librarian was charged with publishing his or her findings regarding the effect of the anti-circumvention provision every three years.⁹⁵

This thesis also is concerned with another Section of the DMCA. In encouraging the development of the Internet, Congress sought to protect online industries from liability. Title II, “Online Copyright Infringement Liability Limitation” seeks to

⁹⁴ See 17 U.S.C. § 1201(a)(1)(C); H.R. Rep. No. 105-551, pt. 2, at 36 “Given the threat of a diminution of otherwise lawful access to works and information, the Committee on Commerce believes that a ‘fail-safe’ mechanism is required. This mechanism would...allow the...[waiver of the anti-circumvention provisions], for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.”

⁹⁵ 17 U.S.C. § 1201(a)(1)(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding on the record for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine—(i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate. (D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of copyrighted work are, or

encourage Internet development by providing shelter to online services from liability suits.

“The notion that service providers should not bear the responsibility for copyright infringements when they are solely transmitting the material is one key to the future growth of the Internet. ...If someone illegally transmits material in the Internet, the Internet companies that provide the opportunity for people to transmit the material shouldn’t be held responsible any more than...Xerox should be held responsible if you violate a copyright by illegally copying material on the Xerox machine.”⁹⁶

Clearly, Internet development was an ominous enticement in Congress’ development of the DMCA. “In short, by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”⁹⁷

By 2003, after the DMCA had been in effect for five years, how had it performed in court? How did it affect the spirit of copyright law?

are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

⁹⁶ Senator John Ashcroft (R-MO), Senate floor debate on S. 2037, the Digital Millennium Copyright Act (May 14, 1998).

⁹⁷ Senator Orrin Hatch (R-UT), Senate floor debate on S. 2037, the Digital Millennium Copyright Act (May 14, 1998).

Chapter IV: Literature Review

A. Primary Sources.

This thesis uses various sources beginning, of course, with the Constitution's foundation of copyright in the United States. "Congress shall have the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."⁹⁸ Some additional sources are listed here.

In addition to the Constitution, this thesis examines one particular amendment to U.S. copyright statutes, the 1998 Digital Millennium Copyright Act.⁹⁹ That Act addressed copyright in the age of digital technology, specifically the Internet. This thesis examines two particular sections of the DMCA, Section 1201, which makes circumvention of copyright protection devices illegal, and Section 512, which provides "safe harbor" for Internet service providers when their users post copyrighted information online.

The legislative history of the DMCA was also sourced. Those hearings and floor debates provided insight into the legislators' intentions during the bill's drafting. Furthermore, this history illustrated the various draft changes that resulted in the finished DMCA.¹⁰⁰

⁹⁸ U.S. Constitution, Article I, Section 8.

⁹⁹ The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

¹⁰⁰ Floor statements accompanying introduction of S. 1121, WIPO Copyright and Performances and Phonograms Treaty Implementation Act (July 29, 1997); Text of H.R. 2281, WIPO Copyright Treaty Implementation Act, as originally introduced (July 29, 1997); H. Rept. 105-551 (Part I), Report of the House Judiciary Committee on Courts and Intellectual Property (September 16 and 17, 1997); S. Rept. 105-190, Report of the Senate Judiciary Committee on S. 2037, the Digital Millennium Copyright Act (May 6, 1998); Senate floor debate on Senate version of the bill, S. 2037, the Digital Millennium

These DMCA provisions have resulted in several cases where the law was called into question. Some cases cited here came before the DMCA, but the circumstances were directly relevant to this thesis. Cases include *Religious Technology Center v. Netcom*, in which Dennis Erlich had posted the copyrighted work of L. Ron Hubbard on his own web site.¹⁰¹ Religious Technology Center owned the copyright, and asked Erlich to remove the work. When Erlich refused, Religious Technology Center asked Netcom to remove the material—Netcom was the ISP providing Erlich with Internet service. Netcom refused because Religious Technology Center did not provide adequate proof of their copyright ownership.

Also, *United States of America, v. Elcom*, in which a software company devised a system that allowed users to copy E-Books from CD to hard drives.¹⁰² The CDs contained electronic versions of books. Users could buy the CD and read the document from their computers. However, software devices contained on the CD prevented the user from copying the information (and a message on the system claimed that reading the book aloud was also a violation of copyright). But the device also restricted what users could do with the E-Book once they bought it. After some pretrial publicity, charges were dropped. But the case still raised important distinctions regarding the DMCA.

Copyright Act (May 6, 1998); Hearing on H.R. 2281 before the House Subcommittee on Telecommunications, Trade, and Consumer Protection (June 5, 1998); Text of H.R. 2281, the Digital Millennium Copyright Act, as reported by House Commerce Committee (July 22, 1998); House floor debate on H.R. 2281, the Digital Millennium Copyright Act (August 4, 1998); House floor debate on Conference Report on H.R. 2281, the Digital Millennium Copyright Act (October 12 and 13, 1998).

¹⁰¹ See *supra*, note 78.

¹⁰² See *supra*, note 91.

In a pair of cases, *Universal City Studios, Inc. v. Reimerdes*, and *Universal City Studios v. Corley*, the DMCA anti-circumvention provision received infamous notoriety. Both cases involved a program called DeCSS, which was an anti-circumvention device used to crack the security software that accompanies DVD movies.¹⁰³ When movie studios delivered DVD movies, they used CSS code to protect the content from copying. A Norwegian teenager successfully defused CSS with his program DeCSS, and made the program available on the Internet. Both Reimerdes and Corley carried the program on their web sites, and were subsequently sued by a host of movie houses. Soon after the enactment of the DMCA, some of its provisions were being scrutinized in the *Reimerdes* and *Corley* defenses. Both trials and their outcomes were significant to the history of the DMCA and its development.

Although it came before the DMCA, *Sony v. Universal City Studios*, “the Betamax Case,” was an historically important decision regarding the anti-circumvention provision.¹⁰⁴ In that trial, Universal sued Sony when it manufactured the VCR for sale to the public. Because of the VCR’s copyright infringement capability, Universal claimed the device would be used to facilitate massive and costly copyright infringement. The court disagreed, in part because of the non-infringing uses of a VCR. However, the case is important for discussion because of the circumvention precedent set fourteen years before the enactment of the DMCA.

¹⁰³ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 346 (S.D.N.Y. 2000), and *Universal City Studios, Inc. v. Corley*, 273 F3d 429, 60 USPQ2d 1953 (2d Cir. 2001).

¹⁰⁴ *Sony v. Universal City Studios*, the “Betamax Case,” 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984).

In *A&M Records v. Napster* a “peer-to-peer” web site operator linked end users to other end users all over the world.¹⁰⁵ End users made lists of their own digital music files, and made those lists accessible from the Napster site. Each user could then review those lists and select songs to download from other users. The fact that Napster was a “peer-to-peer” site is significant because the digital songs were never physically located on Napster’s servers. A&M Records, and a large number of music industry corporations, sued Napster for copyright infringement, in part under the DMCA Section 512. The District Court agreed with the music industries and, in effect, terminated the Napster web site. The case raised questions about the DMCA and fair use, and it served as a precedent for other DMCA trials.

For example, in *ALS Scan v. RemarQ*, a provider of pornographic images, sued an ISP when the ISP refused to take down copyrighted images from a user’s newsgroup.¹⁰⁶ ALS Scan, an adult content business, claimed copyright ownership of images found on a newsgroup that was carried by RemarQ, an ISP. ALS Scan asked the ISP to remove the material, but the request itself did not meet all the requirements outlined in the DMCA. Because of that, RemarQ refused to comply, and ALS Scan sued. The District Court found in favor of ALS Scan, ruling that rigid compliance with the DMCA requirement for notification was not absolute. Establishment of precedent may be the most important outcome of this decision.

Just one year after the *ALS Scan* decision, RemarQ was back in court again, this time as part of the defense in *Ellison v. Robertson*.¹⁰⁷ Again, Section 512 came

¹⁰⁵ *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (2001).

¹⁰⁶ *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F. 3d 619 (2001)

¹⁰⁷ *Ellison v. Robertson*, 189 F. Supp. 2d 1051 (2002).

into question as a writer claimed unauthorized copies of his material were found on several ISPs, including America Online. But different from the *ALS Scan* decision, this case was resolved in favor of the ISPs, and it raised additional concerns regarding specific language within the Section 512 provisions.

Finally, in *Hendrickson v. eBay*, a copyright owner of the movie *Manson* claimed copyright infringement when he found pirated copies of the tape on the ISP eBay.¹⁰⁸ Like the *ALS Scan* case, Hendrickson did not follow proper protocol for notifying the ISP of the infringing material. However, in *Hendrickson*, the District Court found that the deviations from protocol were significant.

The legislative materials and court decisions discussed above, along with the formative language of Article I, Section 8—the copyright and patent provision of the Constitution of the United States—were the primary sources used for this thesis.

B. Secondary Sources.

Perhaps the controversy accompanying the efforts to interpret and apply Sections 512 and 1201 of the DMCA has increased the commentary on the legislation. A steady supply of law review articles was available providing insight, opinion, history, criticism and even some praise for the DMCA, its provisions, and the resulting case law. Although not exhaustive, this review covers some of most helpful documents in compiling this thesis.

A significant source of information came from Melville Nimmer's 10-volume work *Nimmer on Copyright*, which contains a thorough analysis helpful for

¹⁰⁸ *Hendrickson v. eBay*, 165 F. Supp. 2d 1082 (2001).

understanding the basic principles of copyright.¹⁰⁹ However, particularly helpful was an appended volume of *Nimmer* aimed specifically at the DMCA. The *Congressional Committee Reports on the Digital Millennium Copyright Act and Concurrent Amendments* provided a single source of information that included the “Copyright Term Extension Act,” the “Digital Millennium Copyright Act,” the “WIPO Copyright Treaties Implementation and On-line Copyright Infringement Liability Limitation,” a “Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998,” and the “WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).”¹¹⁰

Two separate texts were particularly notable for summarizing copyright law and specifically issues involving the DMCA. First, *Law of the Internet*, by F. Lawrence Street and Mark P. Grant, included a significant overview of Section 512, the requirements for achieving “safe harbor,” and summaries of relevant cases.¹¹¹ The book also reviewed Section 1201 and summaries for relevant cases, some of which were used in this thesis, including *A&M Records v. Napster*, *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, and *Universal City Studios v. Reimerdes*.¹¹²

Second, *Internet and Computer Law: Cases—Comments—Questions*, was also a valuable, compiled source for copyright issues involving the DMCA.¹¹³ More annotated than *Law of the Internet*, this text extensively reviewed *Universal City*

¹⁰⁹ Nimmer, Melville B., *Nimmer on Copyright*, Lexis Nexis (2002).

¹¹⁰ Nimmer, Melville B., and David Nimmer, *Nimmer on Copyright: Congressional Committee Reports on the Digital Millennium Copyright Act and Concurrent Amendments*, Matthew Bender & Co., San Francisco (2000).

¹¹¹ Street, F. Lawrence, and Mark P. Grant, *Law of the Internet: 2001 Edition*, Lexis Publishing (2000).

¹¹² *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (2001), *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.* 75 F. Supp. 2d, 1290 (1999), and *see supra* note 103.

Studios v. Reimerdes, and other cases involving anti-circumvention. *Internet and Computer Law* also provided an extensive overview of fair use, and first sale. In addition, this text provided legislative descriptions and analysis of concepts like “contributory infringement,” “direct infringement,” and “vicarious infringement.”

Similarly, the *Law of Mass Communications*, by Dwight Teeter and Bill Loving, provided a helpful overview of fair use, and cases involving that statute.¹¹⁴ Specifically, that text provided a useful summary of *Rosemont Enterprises v. Random House, Inc.*, a case that emphasized a *public* interest in the concept of “fair use.” In addition, *Law of Mass Communications* provided a summary of copyright history, beginning with copyright’s existence before U.S. law, and leading up to the U.S. Constitution.

Two texts were especially helpful in conducting historical research, Leon Seltzer’s *Exemptions and Fair Use in Copyright* provided a detailed account of historical events in U.S. copyright history.¹¹⁵ Catherine Seville’s *Literary Copyright Reform in Early Victorian England* described England’s influence on the foundation of U.S. copyright law, and a well-written review of world copyright history.¹¹⁶

In addition to these texts, numerous journal articles provided review and comment on DMCA legislation and trial decisions. Adam Fox’s work *The Digital Millennium Copyright Act: Disabusing the Notion of a Constitutional Moment* helped put into perspective some of the countervailing opinions regarding certain DMCA

¹¹³ Maggs, Peter B., John T. Soma, and James A. Sprowl, *Internet and Computer Law: Cases—Comments—Questions*, American Casebook Series West Group, St. Paul, Minn. (2001).

¹¹⁴ Teeter, Dwight L., and Bill Loving, *Law of Mass Communications: Freedom and Control of Print and Broadcast Media*, Tenth Edition, Foundation Press, New York (2001).

¹¹⁵ See *supra*, note 24.

provisions.¹¹⁷ Of a similar opinion, Diane Leenheer Zimmerman, in her article *Adrift in the Digital Millennium Copyright Act: The Sequel*, proposed that the DMCA statute exhibited a “sense of humor” because of its “sly and unkind wit” regarding the special needs of nonprofit, educational, and research users.¹¹⁸

Finally, Alfred Yen, a Boston College law professor, described potential Section 512 shortcomings in his article *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*.¹¹⁹ Yen has written several articles regarding copyright and the Internet, and his comments were helpful in developing this thesis. While these materials provided essential sources, a host of additional sources also contributed indirectly to this thesis. For example, consider this:

“YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below,” read a letter from Wal-Mart delivered to “FatWallet.com” on November 27, 2002.

“FatWallet” was a site designed to provide a forum for discussing products and prices of consumer goods, and had posted one of Wal-Mart’s Thanksgiving sale flyers on its web pages. In a legal procedure invoking the DMCA’s limited liability provisions, Wal-Mart sought protection under Section 512(c)(1), which calls for a notice of infringement to be sent to the ISP—in this case, FatWallet. Under the DMCA Section 512(h), the copyright owner can request from “the clerk of any United States district

¹¹⁶ See *supra*, note 22.

¹¹⁷ Fox, Adam R., *The Digital Millennium Copyright Act: Disabusing the Notion of a Constitutional Moment*, Rutgers Computer & Technology L.J. Vol. 27 (2001).

¹¹⁸ See *supra*, note 10.

court to issue a subpoena to a service provider for identification of an alleged infringer...”¹²⁰ Wal-Mart need not attain a court order, but show only a copy of the notice sent to FatWallet, a *proposed* subpoena, and a sworn statement that the material is copyrighted.¹²¹ As yet, no suit has been filed.

“Wal-Mart’s action invoked a part of the DMCA that allows a copyright holder to ask for ‘identification of an alleged infringer’ without filing a lawsuit first,”¹²² said Deirdre Mulligan, a privacy expert at the University of California at Berkeley’s Boalt Hall Law School. “People are using the DMCA as an extremely flexible tool that gets ISPs to take down information. ISPs are not in a position to fight back. It requires resources—it puts them in a position where they could assume liability. The ability to silence speakers even where the underlying claim does not have any merit is worrying.”

“If they do not become more careful, the courts may degrade the DMCA into a ‘one free pass’ rule: An ISP would be immune from liability so long as it remained in a state of blissful ignorance, but once it received the first notice of infringing activity, it would be on notice concerning the possibility of future infringements,” said Jonathan Band and Matthew Schruers, “This would mean that ISPs would have to choose between either exposing themselves to infringement liability or incurring

¹¹⁹ Yen, Alfred C., *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Georgetown Law Journal 1833, pg. 1878 (2000).

¹²⁰ 17 U.S.C. § 512(h). See also, Yen note at 191.

¹²¹ *WalMart Obtains DMCA Subpoena to Obtain Identity of Poster of Advertised Price Data*, Tech Law Journal (December 4, 2002) [www.techlawjournal.com/alert/2002/12/04.asp, last visited April 9, 2003] (emphasis added).

¹²² Ebert, Lawrence, B., *It’s Bound to Scare You, Boy*, Intellectual Property Today, Features, pg. 46 (March 2003).

significant monitoring costs. Either alternative will impede the growth of the Internet.”¹²³

Similarly, the DMCA’s anti-circumvention has been the subject of creative lawsuits. A magazine article released at the time of the writing of this thesis called attention to a case that brought a new twist of interpretation to the DMCA’s anti-circumvention provision.¹²⁴ A manufacturer of computer laser printers, Lexmark International, added a computer chip to its printers so that only Lexmark brand toner cartridges were recognized by the printer system. If another brand of toner cartridge were used, the Lexmark printer would not function. Wishing not to lose a share of the toner cartridge market, Static Control Components company developed a replacement chip that allowed the Lexmark printer to operate with any brand of toner cartridge. Lexmark sued Static Control Components for copyright infringement, in part, under the DMCA anti-circumvention provision. In the suit, Lexmark claimed that Static Control’s chip circumvented a security device that protected Lexmark’s copyrighted software within the printer itself. On February 27, 2003, a district court agreed, issuing a preliminary injunction on behalf of Lexmark.¹²⁵

“A question for the courts will be whether the DMCA was intended to apply in these circumstances,” said Steve Seidenberg, attorney and freelance writer. “But what Congress intended, and what the law says, may be two separate things.”

¹²³ Band, Jonathan, and Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, *Cardozo Arts & Entertainment Law Journal*, Vol. 20, No. 2 (2002).

¹²⁴ Ebert, Lawrence, B., *It's Bound to Scare You, Boy*, *Intellectual Property Today*, Features, pg. 46 (March 2003).

¹²⁵ *Lexmark International Inc., v. Static Control Components, Inc.*, Civil Action No. 02-571-KSF, E.D. Kent. (2003).

Seidenber cited one attorney who said “[The Lexmark case] is far, far beyond what Congress intended, but if I look at recent cases interpreting the DMCA, I think, unfortunately, Lexmark has a good case.”¹²⁶ The Lexmark outcome will be worth watching.

Beginning with its enactment about 4 ½ years ago, the DMCA has spawned a plentiful supply of literature. In evaluation of the Act, some of those journal articles are critical of the Act’s effect on the First Amendment. This literature review outlines some of those articles, and highlights specific suggestions for improving the DMCA in an effort to better balance copyright protection.

For example, Martin Halstead, in a *Tulsa Law Review* article, suggested the DMCA was a serious blow the principle of fair use. “In the period between the Copyright Act of 1976 and the DMCA, fair use was a codified judicial doctrine under which use would be judged fair or unfair on the basis of statutory guidelines,” he said. “The DMCA effectively swept away the greater part of [that] doctrine while stating an express intent not to do so.”¹²⁷

Consider an American who buys a DVD loaded with research material, Halstead suggests. The DVD was available only from France. Upon receiving the DVD, the American discovers it will not play in his player because it is “regionally

¹²⁶ Seidenberg, Steve, *Suits Test Limits of DMCA*, Connecticut Law Tribune, Vol. 3, No. 5, pg. 10, March 5, 2003. Seidenberg explained “This isn’t the first time that manufacturers have tried to use copyright law to prevent third-party add-ons. For instance, Sega, the manufacturer of a popular game console, sued the maker of some third-party games for copyright infringement, because the gamemaker embedded some of Sega’s copyrighted software into its own products so the games could run on Sega’s machines. The courts held that copying software code in order to create interoperability is fair use. So the third-party manufacturer won the case.”

¹²⁷ Halstead, Martin F., *The Regulated Become the Regulators: Problems and Pitfalls in the New World of Digital Copyright Legislation*, *Tulsa Law Review*, Vol. 38, No. 1, pg. 195 (Fall 2002).

formatted” for play only in western Europe. A friend shows the American how to disable that formatting so the DVD will play on his player. Although the French company selling the DVD has received payment from the American for one copy of the DVD, both American men are guilty of violating the DMCA because they disabled a device that protects copyrighted information.

In offering a potential solution to the DMCA’s balance problem, Halstead first suggested tolerance from the copyright owners, appearing to agree in concept with Variety.com editor, Travis Smith who claimed the Internet and digital revolution are *not* damaging to copyright owners, but simply change the business model.¹²⁸ “The copyright system,” Halstead said, “can and perhaps should survive a certain amount of home copying as part of the price of the acknowledged benefits that fall to copyright holders from technology.”¹²⁹ In applying the DMCA legislation to the music recording industry, Halstead suggested the recording industry “should focus its efforts on unauthorized *distribution* of copyrighted works as the true threat to the commercial balance between users and producers.”¹³⁰ In other words, it is the distribution of the material that violates copyright protection, and not the access to, or the downloading of material.

Tonia Pever agreed. In her Capital University Law Review article, Pever recommended amending the DMCA to specify that copyright infringement is found

¹²⁸ See *infra*, note 221.

¹²⁹ See *supra*, note 127.

¹³⁰ See *supra*, note 127 (emphasis added).

only when the infringer is using the material for “commercial use.”¹³¹ Citing Jessica Litman, a professor of law at Wayne State University, Pever argued that it should be only “commercial use”—the user intending to profit from the owner’s work—that constitutes copyright infringement. Digital reproduction is too pervasive to control, and simple copying of material should not, in and of itself, be considered copyright infringement.¹³²

Finally, Halstead suggested, the DMCA may circumvent the “First Sale” doctrine. “Presently, a buyer may resell a work (such as a used book or CD) to a third party without payment of a royalty on the second sale. However, many of the copy protection schemes currently being introduced prevent copying by ‘tying’ use of a recording or e-book to a specific user or a specific computer. The purchaser cannot sell the recording to another when he is finished with it, as the recording or book functions only on the specific computer or hard drive to which it is ‘tied.’”¹³³

Perhaps the simplest advice for improving the DMCA came from Tricia J. Sadd, who at the time of her publication was a Juris Doctor Candidate at George Mason University School of Law. Sadd suggested the DMCA’s shortcomings in regard to fair use could be eliminated with an alternative reading of the existing DMCA Section 1201. “[T]he ‘fail-safe’ mechanism of section 1201(a) can be seen as undergirding, rather than replacing, fair use. Such a reading avoids the total rejection

¹³¹ Pever, Tonia, *The Transfer of Media to Digital Form: Redefining the Copyright Infringement Test to Include Commercial Use as a Digital Copyright Infringement*, Capital University Law Review, Vol. 31, No. 1, pg. 109 (2003).

¹³² *Ibid.* See also Jessica Litman, *Revising Copyright Law for the Information Age*, The Internet and Telecommunications Policy: Selected Papers from the 1995 Telecommunications Policy Research Conference 272 (Gerald W. Brock & Gregory L. Rosston eds. 1996).

¹³³ See *supra*, note 127.

of fair use as a defense under the DMCA. By opening up the possibility of distributing circumvention devices for fair use, the DMCA can be seen to acknowledge the new right of access given to copyright holders as well as a corollary right of access for fair uses. Such an interpretation avoids the possibility that one could have a right to access, but not a right to a means of access.”¹³⁴ Referring to the subsections of 1201, Sadd suggested that, for example, 1201(b) could include fair use as a legitimate means for accessing copyrighted work. “The prohibition contained in subparagraph (A) shall not apply to persons who are...adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that ...work.”¹³⁵

In applying this need for alternative interpretation to Section 512 of the DMCA, Band and Schruers are in agreement. “[U]nless the courts begin applying the DMCA in accordance with its plain language and its clear legislative history, Congress may have to dredge out the DMCA’s safe harbors so as to restore them to their intended effectiveness.”¹³⁶ However, under scrutiny of U.S. courts, neither of these interpretations has yet to surface.

Research also uncovered some solutions that were vague and without actual suggestions for a change in the DMCA’s language. For example, one critic suggested that the problem requires a clearer interpretation of infringement defined by the entertainment industry and the scientific industry. “The most immediate solution would involve an alliance and discourse between the entertainment industry and the scientific community,” she said, “encouraging the promotion of scientific research

¹³⁴ Sadd, Tricia J., *Fair Use as a Defense under the Digital Millennium Copyright Act’s Anti-Circumvention Provisions*, George Mason Law Review, Vol. 10, No. 2, pg. 321 (Winter 2001).

¹³⁵ *Ibid.*

and exchange of ideas, while jointly working towards the eradication of digital piracy. Such efforts could involve a study of the First Amendment concerns, and how the RIAA, long an advocate of free speech, could be involved in efforts to protect its interests, while safeguarding the rights of others to freely publish their communications. Such analysis of current standards may reveal that the DMCA must be more specific in scope on what type of research leads to infringement. ...An industry consensus must be reached explicitly adopting its position on scientific research and what it considers to be impermissible copyright infringement under the DMCA.”¹³⁷

Other articles turned up general discussions regarding the DMCA and Sections 1201 and 512. A recent article by Joseph Chovanes examined the findings in the recent *Elcom* case.¹³⁸ Chovanes looked at the plaintiff’s arguments, and recounted the courts’ responses to those arguments, especially highlighting the challenges to the Constitution.¹³⁹

Plaintiffs in *Elcom* argued that the DMCA was impermissibly vague, and “thus violated the due process guarantees of the Fifth Amendment.”¹⁴⁰ The First Amendment issues raised in both cases were predicated on the defendant’s arguments that the DMCA “violated a number of First Amendment protections, by both attempting to ban protected speech [the defendant’s computer program] and

¹³⁶ See *supra*, note 123.

¹³⁷ Harper, Tieffä, *Much Ado About The First Amendment—Does the Digital Millennium Copyright Act Impede The Right To Scientific Expression?: Felten v. Recording Industry Association of America*, *Journal of Art and Entertainment Law*, Vol. 12, No. 1, pg. 3 (Spring 2002).

¹³⁸ See also note 231.

¹³⁹ Chovanes, Joseph, *News*, *National Law Journal*, Vol. 25, No. 68, pg C3 (January 20, 2003).

¹⁴⁰ *Ibid*.

attempting to ban protected third-party rights [the right of access to public-domain information and the right to fair use].” *Elcom* plaintiffs argued that the prohibited conduct was too vague to be understood. “Congress had not intended to ban all tools providing for copying because such a ban would include tools that provided for legal ‘fair use’ copying. Therefore, since the act banned only those tools that facilitated the production of infringing copies, the nature of those tools and their ban could simply not be understood.”¹⁴¹

The court was unmoved. “The statute does not distinguish between devices based on the uses to which the device will be put. Instead, all tools that enable circumvention of use restrictions are banned, not merely those use restrictions that prohibit infringement.”¹⁴²

In *Copyright in Cyberspace: Taking a Stand for Libraries and Library Users*, Gretchen Hoffman said “While Section 1201(c) of the Copyright Act states that nothing in the DMCA shall affect fair use, and Section 1201(d) allows certain nonprofit libraries to ‘gain access’ to a protected work for purposes of evaluating the work for possible acquisition, Section 1201(a) prohibits importation of equipment that allows circumvention of technologies preventing access to a copyrighted work. In other words, parts of the DMCA try to placate librarians by saying that fair use will not be affected by the act, but it goes on to prohibit the very technology that may be necessary to engage in uses that are indeed fair.”¹⁴³ Hoffman urges fellow librarians to “be assertive” and to not be complacent in regard to legislation that may reduce fair

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

use. “[I]f librarians are conservative and limit themselves to the minimal uses put forth in guidelines, they are giving up the fight and limiting fair use forever to those standards.”¹⁴⁴

In a similar subject to the development of anti-circumvention technology, the DMCA also seeks to prevent the act of *trafficking* in anti-circumvention technology, and that subject was well covered in *Universal City Studios v. Corley*.¹⁴⁵ In that case, a web site operator was sued, in part, for placing hyperlinks on his web site that led users to an anti-circumvention technology called DeCSS.¹⁴⁶ *Corley* focused heavily upon not just the DeCSS program that was posted at the 2600, Inc. web site, but also the links posted on that site that led to other sites that posted the DeCSS program. After the hearing, the court banned Corley from posting DeCSS on his site, and also from “knowingly linking via a hyperlink to any other web site containing DeCSS.”¹⁴⁷

The court relied upon the DMCA anti-trafficking provision, which states: “No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof.”¹⁴⁸

“The *Reimerdes-Corley* decisions¹⁴⁹ indicate that it is no longer sufficient to convince the courts of the *existence* of a constitutional requirement of fair use, since the DMCA preserves many conventional forms of such fair use (i.e. pointing a camcorder at a monitor displaying DVD movies encrypted with CSS). Rather, future

¹⁴³ Hoffman, Gretchen McCord, *Copyright in Cyberspace: Questions and Answers for Librarians*, Neal-Schuman Publishers, Inc., New York, pg. 147 (2001).

¹⁴⁴ *Ibid*, pg. 149.

¹⁴⁵ *See supra*, note 103.

¹⁴⁶ *See infra*, note at 180 for full discussion on DeCSS.

¹⁴⁷ *See supra*, note 103.

¹⁴⁸ 17 U.S.C. § 1201(a)(2) and 1201(b)(1).

litigants must convince the courts that a constitutional requirement of fair use exists, *and* that its contour is such that it invalidates any measure which prohibits the most prevalent, efficient, or superior form of fair use (i.e. one that displaces copy machines in favor of scribing monks). The *Corley* decision indicates, however, that unless and until the Supreme Court ‘ratifies’ its previous ‘isolated statements’ to recognize a sweeping constitutional right of fair use approaching the absolute, this battle is going to be uphill.”¹⁵⁰

In a similar challenge, a Utah court determined in *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*¹⁵¹ that the defendants had likely “engaged in contributory copyright infringement when they posted the addresses of three web sites that they knew, or should have known, contained pirated copies of the Mormon Church’s Handbook of Instructions.”¹⁵² According to case law, contributory infringement has occurred when “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”¹⁵³

Under the *Intellectual Reserve* case, the court considered the following questions to determine contributory infringement:

1. Can the defendants be liable under a theory of contributory infringement for the actions of those who posted the handbook on the three web sites?

¹⁴⁹ See *infra*, note 180.

¹⁵⁰ Mihet, Harry, *Universal City Studios, Inc. v. Corley: The Constitutional Underpinnings of Fair Use Remain an Open Question*, Duke Law and Technology Review (February 14, 2002), [www.law.duke.edu/journals/dltr/articles/2002dltr0003.html, last visited April 9, 2003].

¹⁵¹ *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.* 75 F. Supp. 2d, 1290 (1999).

¹⁵² Pope, Cameron, *Missing Link(s): Protecting Public Image And Corporate Profits In Cyberspace*, Houston Law Review, Vol. 38, No. 651 (2001).

¹⁵³ *Gershwin Publishing Corporation v. Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 (2d Cir. 1971).

The defendants admitted that the three web sites did in fact infringe on Utah Lighthouse Ministry copyright. However, the court also found that the defendants did not directly contribute to the infringement because they did not provide the copyrighted material in the first place, nor were they receiving any kind of compensation from the three sites.

2. Can the defendants be liable under a theory of contributory infringement for the actions of those who browse the three infringing Web sites?

The defendants made two arguments claiming that people who browse the three web sites are not actually infringing on Utah Lighthouse Ministry's copyrights. Looking at those two claims one at a time, first the defendants claimed the people browsing the three sites are merely looking at the Handbook of Instructions and not actually copying it.¹⁵⁴

To this argument the court disagreed. In following *the MAI Systems Corp. v. Peak Computer, Inc.* decision, the court found that when viewing material online, the computer loads the screen information into random access memory (RAM), an automatic, temporary storage system that computers must use to display information. Once that copy is made in RAM, copyright has been infringed.¹⁵⁵

Under existing Copyright law, the courts and the NII have agreed that copyright infringement does take place when a copy is created in the computer's RAM. Therefore, the act of viewing online content is enough to contribute to copyright infringement. However, the courts also have held that liability for copyright

¹⁵⁴ See *supra*, note 151.

¹⁵⁵ *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F. 2d 511 (9th Cir. 1993).

infringement is with the persons who caused the display or distribution of the infringing material onto their computer.¹⁵⁶

Second, the defendants claimed they did not materially contribute to the infringing conduct. To this, the court also disagreed. “After being ordered to remove the Handbook of Instructions from their web site, defendants posted: ‘Church Handbook of Instructions is back online!’ and listed the three web site addresses.”¹⁵⁷ Furthermore, the defendants were caught through email conversations providing downloading encouragement and advice to their users.

¹⁵⁶ *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors*, 983 F. Supp. 1167, 1179 (N.D. Ill. 1997).

¹⁵⁷ See *Supra* note 151.

Chapter V: The DMCA in Action: Copyright Balance as Interpreted by US Courts

As covered in the previous pages of this thesis, two sections of the DMCA are of particular interest in evaluating the spirit of copyright law and its current rendition in the latest amendment to Title 17 of the U.S. Code; Section 1201, *Circumvention of copyright protection systems*, and Section 512, *Limitations on liability relating to material online*. During the first four-plus years after the DMCA was enacted in 1998, how have courts started to interpret its language?

A. Title I § 1201. Circumvention of copyright protection systems

Perhaps because of the DMCA's relative youth, there are relatively few decisions based upon Section 1201. However, some key concerns already have come to the surface. Of primary interest is the balance of copyright power expressed so often throughout U.S. copyright's existence and often referred to by the framers of the 1998 amendment to the Copyright Act.

In drafting the DMCA, legislators expressed their desire to maintain fair use and "provisions for library browsing, special needs of individual creators regarding copyright management information, provisions exempting nonprofit archives, nonprofit educational institutions, and nonprofit libraries from criminal penalties and, in the case of civil penalties, remitting damages entirely when such institution was not aware... that its acts constituted a violation."¹⁵⁸ Echoing those sentiments in a House floor debate days before the DMCA bill passage, Representative Rick Boucher (D-

VA) said “...these [DMCA] provisions demonstrate that the legislation is not intended to diminish core fair use and other rights that have always been recognized in our copyright law.”¹⁵⁹

So just what is circumvention? According to the DMCA, Section 1201(b)(1)(A), “to ‘circumvent a protection afforded by a technological measure’ means *avoiding*, bypassing, removing, deactivating, or otherwise impairing a technological measure.”¹⁶⁰ In his June, 1998 testimony, Gary Shapiro also addressed the language in 1201(b)(1)(A), “it would make designers of new devices, such as computers and VCRs, as well as high definition television sets and set top boxes, responsible for *responding to* and implementing any and all technical anti-copy measures chosen by anyone who transmits a signal or distributes a program.”¹⁶¹ Spoken like an electronics industry spokesperson, Shapiro translates the DMCA word “avoiding” to mean devices must be designed to “respond” to security measures. In other words, suppose HBO protects its movie service with a new scrambling technology. Simultaneously, RCA develops a new 36-inch digital television set. When the RCA set is attached to a cable service, the television unscrambles the HBO signal. In the DMCA language, the RCA set is “avoiding” a technological measure and could no longer be built. Congress clearly did not seek this type of confusion. “Nothing could cause greater disaster and a swifter downfall of our vibrant technology sector than to have the federal government dictating the design of

¹⁵⁸ Senator Orrin Hatch (R-UT), Senate floor debate on Senate version of the bill, S. 2037, the Digital Millennium Copyright Act (May 14, 1998).

¹⁵⁹ Representative Rick Boucher (D-VA), House floor debate on Conference Report on H.R. 2281, the Digital Millennium Copyright Act (October 12, 1998).

¹⁶⁰ 17 U.S.C. § 1201(b)(1)(A). emphasis added.

computer chips or mother boards,” said Senator John Ashcroft (R-MO), during a senate floor debate on S. 2037, the Digital Millennium Copyright Act. Now that the DMCA is law, the question becomes one of interpretation.

Unfortunately, the letter of the law often fails to retain the intricacies of good intentions. With the threat of being locked out of browsing online material protected by security devices, libraries, academicians and researchers cried foul.¹⁶² Section 1201 says simply, “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”¹⁶³ This seemed to lock fair users out of access to protected material. A subsequent section, however, followed up with a potential life-line for fair use. “Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”¹⁶⁴ But just as Gary Shapiro predicted back in June, 1998, a court in *Universal Studios v. Corley* three years after enactment of the DMCA found that Section 1201 outlawed circumvention of copyrighted material, regardless of whether or not the material accessed would be put to “fair use.”¹⁶⁵

In its decision, the court explained that subsection 1201(c)(1) “clarifies that the DMCA targets the circumvention of digital walls guarding copyrighted material, but does not concern itself with the use of those materials after circumvention has occurred.” The court cited the DMCA’s legislative history regarding the “fail safe” provision, which “authoriz[es] the Librarian of Congress to exempt certain users from

¹⁶¹ See *supra* note 81, emphasis added.

¹⁶² See *supra* note 59, “Some assert that copyright protection should be reduced in the NII environment. The public wants information to be free and uncumbered on the NII...” page 14.

¹⁶³ 17 U.S.C. § 1201(a)(1)(A).

¹⁶⁴ 17 U.S.C. § 1201(c)(1).

the anti-circumvention provision when it becomes evident that in practice, the statute is adversely affecting certain kinds of fair use.”¹⁶⁶

A potential problem, of course, arises because the Librarian of Congress is unable to peruse and ascertain the exemption potential of innumerable resources on the World Wide Web. One wonders if the recommendations of the president and CEO of the Consumer Electronics Association, Gary Shapiro, would have improved the situation. “[The anti-circumvention] legislation, threatens to obliterate the right of libraries to serve their patrons and of others to make use of exceptions and limitations in the Copyright Act,” he said. To repair the problem, he proposed a two-part amendment to Section 1201. First, he recommended clarification that 1201(a)(1) prohibit circumvention only “for purposes of facilitating or engaging in an act of infringement.” Second, he recommended replacing 1201(d) with “All rights, limitations and defenses available under this title, including fair use, shall be applicable to actions arising under this Chapter.” This change would have required flexibility from the copyright industries because piracy would possibly become an easier crime to commit. But would Shapiro’s recommendations better achieve copyright balance? *Universal City Studios v. Corley* (2nd Cir., 2001) suggests not.

Universal City Studios v. Corley is a case closely tied to *Universal City Studios v. Reimerdes*, decided one year earlier.¹⁶⁷ After successfully entering the digital age, movie studios were eager to embrace this new technology. However, just as the introduction of the VCR brought fear of piracy, so digital technology caused

¹⁶⁵ *Universal City Studios, Inc. v. Corley*, 273 F3d 429, 60 USPQ2d 1953 (2d Cir. 2001).

¹⁶⁶ *Ibid.*, at Discussion, and court footnote 13.

¹⁶⁷ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d. 346 (S.D.N.Y. 2000).

concern for mass unauthorized distribution of copyrighted work.¹⁶⁸ *Reimerdes* involved copyright owners (Universal) attempting to prevent unapproved copying of digital-versatile-disk (DVD) movies. A DVD is a computer diskette (similar in looks to an audio compact disc) that holds information digitally. Like a VHS tape, a DVD is most often used to hold full-length feature movies, and it is the latest technological advancement for consumer home-movie entertainment—a technology that will surely displace the traditional VCR player.

For Universal, this was not new legal territory. Just sixteen years earlier in 1984, Universal City had faced off with Sony Corporation in a similar case involving videocassette tapes.¹⁶⁹ In that case, Universal argued the VCRs were being used to make illegal copies of copyrighted television programs. By linking a VCR machine to a television set, a television program could be taped onto a blank VHS (or Betamax) tape. Sony was eventually found innocent of contributory copyright infringement because the court considered other possible uses provided by a VCR, primarily taping a television program from a “free” channel such as public television.¹⁷⁰ Because these “non-infringing” uses were legitimate under the law, the court did not force Sony to cease manufacturing VCRs.

After the *Sony* case, Universal City Studios learned that the home video market became a booming business. Instead of fighting home video technology manufacturing, Universal City and other entertainment companies later joined forces with these manufacturers to help develop the DVD player. Important to the motion

¹⁶⁸ *Sony v. Universal City Studios*, the “Betamax Case,” 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d. 574 (1984).

¹⁶⁹ *Ibid.*

picture industry was incorporating technology into the DVD players that would circumvent illegal copying of the movies. As a result, the manufacturers developed a “content scramble system” (CSS) that consisted of an encryption technology that scrambled the contents of a DVD. In order for the content to play back on a DVD player, the player needed the proper technology to descramble the CSS. Therefore, copyright circumvention technology was in place and DVD players manufactured without CSS technology would not play a majority of feature motion picture DVDs.¹⁷¹

Not long after, individual computer software developers began working on ways to circumvent this CSS technology. Eventually, a Norwegian teenager was able to develop a software program that successfully decrypted CSS.¹⁷² He named this program DeCSS and immediately made it available on the Internet. DeCSS was an anti-circumvention device that unscrambled the CSS protection and made the content (the movie itself) available for playing on non-CSS-compatible players, and it allowed for copying the entire movie onto a computer hard drive. Of course, once the movie is loaded onto a hard drive, it can then be copied to any number of blank DVDs.

In the *Reimerdes* case, Universal battled against this new DeCSS technology. Unlike the *Sony* case, where VCR copies suffered from poor quality with each

¹⁷⁰ *Ibid.*

¹⁷¹ See *Universal City Studios, Inc. et al. v. Shawn C. Reimerdes, et al.*, [motion for recusal] 104 F. Supp. 2d 334 (2000), opinion by U.S. District Judge Lewis A. Kaplan.

¹⁷² USA Today, “DVD Hacker” Vows Lengthy Court Battle (January 30, 2002). Bangkok Post, *Don’t Copy This At Home* (January 23, 2002). VNU Business Publications, Ltd. *Hacker Mag Takes On US Court* (January 16, 2002). Nordic Business Report, *Norwegian Authorities Charge Teenager Software Author* (January 14, 2002).

subsequent generation of copy, the DVD player could make copies with virtually no quality degradation. The defendant, Shawn Reimerdes, posted the DeCSS code on a Web site he co-operated, 2600 Enterprises, Inc., a site devoted to computer software developers and specifically “hacking.”¹⁷³

In making their case, Universal cited the DMCA anti-circumvention provision that states in part,

“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”¹⁷⁴

Since DeCSS clearly meets the definition of an anti-circumvention device, the case seemed open and shut. However, there are exceptions to the anti-circumvention provisions. These exceptions could make anti-circumvention legal and render corporate information unprotected. The DeCSS developers claimed to be reverse-engineering the CSS program in an effort to create DVD-player software for the Linux operating system, software that was at the time unavailable.¹⁷⁵ Under the DMCA,

“a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging

¹⁷³ See *supra* note 165, the name ‘2600’ has telling inspiration. Second Circuit Court of Appeals Judge Jon O. Newman explains “‘2600’ has special significance to the hacker community. It is the hertz frequency of a signal that some hackers formerly used to explore the entire telephone system from ‘operator mode,’ which was triggered by the transmission of a 2600 hertz tone across a telephone line, or to place telephone calls without incurring long-distance toll charges.”

¹⁷⁴ 17 U.S.C. § 1201(a)(1)(A)

¹⁷⁵ See *supra* note 10, part II. Linux is an operating system that competes with the Microsoft Windows operating system.

in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.”¹⁷⁶

During the *Corley* trial, another question of copyright balance rose to the court’s attention. If a user buys a copyrighted work, does he or she gain the legal right to manipulate that product so that it can be displayed using an alternative device, a capability not otherwise available with the copyrighted work? Section 1201(a)(3) explains “to ‘circumvent a technological measure’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner...”¹⁷⁷ It was this provision the court applied in evaluating one prong of Corley’s defense, which claimed that “an individual who buys a DVD has the ‘authority of the copyright owner’ to view the DVD, and therefore is exempted from the DMCA pursuant to subsection 1201(a)(3)(A) when the buyer circumvents an encryption technology in order to view the DVD on a competing platform (such as Linux).”

The court disagreed. In an argument strikingly similar to the fair use argument in the *Reimerdes* case, the court found that 1201(a)(3)(A) *did* in fact make it legal to decrypt protected material given copyright owner approval, but found that the provision did not give the right to look at the material in any circumstance. “[Section 1201(a)(3)(A)] exempts from liability those who would ‘decrypt’ an encrypted DVD with the authorization of a copyright owner, not those who would ‘view’ a DVD with

¹⁷⁶ 17 U.S.C. § 1201(f)(1)

¹⁷⁷ 17 U.S.C. § 1201(a)(3)(A).

the authorization of a copyright owner.”¹⁷⁸ Again, the emphasis of this DMCA provision enforces the act of anti-circumvention, and not the use or misuse of the copyrighted material itself. In other words, the DMCA makes breaking into a room illegal, but says nothing about what you do in the room once you are in there.

Surprisingly, the *Corley* defense did not invoke subsection 1201(f)(2), which says “...a person may develop and employ technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable the identification and analysis under paragraph (1), or *for the purpose of enabling interoperability of an independently created computer program with other programs, if such means are necessary to achieve such interoperability*, to the extent that doing so does not constitute infringement under this title.”¹⁷⁹ Of course, the final phrase may eliminate this subsection as a defense of any kind. However, the *Reimerdes* team did offer this provision as a defense. “[Defendants]... contend that DeCSS is necessary to achieve interoperability between computers running on the Linux system and DVDs and that this exception therefore is satisfied.”¹⁸⁰

Unmoved by this interpretation, the court invalidated this defense for three reasons. First, the defendants offered no evidence to support the claim. Second, in a

¹⁷⁸ See *supra* note 165, “This is actually what subsection 1201(a)(3)(A) means when read in conjunction with the anti-circumvention provisions. When read together with the anti-trafficking provisions, subsection 1201(a)(3)(A) frees an individual to traffic in encryption technology designed or marketed to circumvent an encryption measure if the owner of the material protected by the encryption measure authorizes that circumvention.”

¹⁷⁹ 17 U.S.C. § 1201(f)(2), emphasis added. The record shows that the *Corley* defense did invoke this provision as part of their defense arguments in an earlier court motion for sanctions and other relief. The defense apparently did not revisit this provision with the appeals court a year later. See *supra* note 165.

rather short-sighted opinion, the court noted that while DeCSS runs under Linux, it also runs under Windows—“a far more widely used operating system.” Therefore, defendants could not claim that DeCSS was designed solely for Linux. The court reasoned that because of the interoperability of DeCSS, it could not possibly be designed exclusively for Linux, a ruling that seems to require that devices be designed with conscious regard for whether or not they produce interoperability. Third, the court ruled that 1201(f) “permits reverse engineering of copyrighted computer programs only and does not authorize circumvention of technological systems that control access to other copyrighted works, such as movies.”¹⁸¹

It would appear, then, that where access to information challenges copyright protection, specifically in regard to provision 1201 in the DMCA, courts are interpreting in favor of copyright ownership. Admittedly, there are few decisions as this is written in early 2003, and that small sampling of subject matter has not produced a broad sample of decisions to evaluate Section 1201. Still, with the decisions resulting from *Reimerdes* and from *Corley*, the courts have interpreted the DMCA to primarily defend security of the copyright owner. “Now that the legal community has had an opportunity to test the DMCA in the courts,” said critic Anna Claveria Brannan, “it is apparent that the new law needs to be amended, and the Internet culture needs to undergo a shift in its free-for-all based philosophy.”¹⁸²

¹⁸⁰ *Universal City Studios Inc. v. Reimerdes*, 82 F. Supp. 2d. 211; 2000 U.S. Dist. LEXIS 906; 53 U.S.P.Q.2D (BNA) 1780.

¹⁸¹ *Ibid.*

¹⁸² Brannan, Anna Claveria, *Fair Use Doctrine and the Digital Millennium Copyright Act: Does Fair Use Exist under the DMCA?*, Santa Clara Law Review, Vol. 42, No. 1 (2001), page 247.

B. Title II § 512. Limitations on liability relating to material online

Though perhaps less contentious in its legislative history than the anti-circumvention provisions, Section 512 of the DMCA also has come under criticism.¹⁸³ The provision seeks to provide “safe harbor” for Internet service providers that unknowingly post (or allow to be posted) copyright-protected material. Unfortunately, the legislation found under 512 seems confusing and convoluted in the view of Boston College Law Professor Alfred C. Yen.¹⁸⁴ To enjoy protection from safe harbor, service providers must meet the following provisions outlined in Section 512(c)(1)(A):

1. [An Internet service provider must] not have actual knowledge that the material or an activity using the material on the system or network is infringing;
2. In the absence of such actual knowledge, [the ISP] is not aware of facts or circumstances from which infringing activity is apparent; or
3. Upon obtaining knowledge or awareness, [ISP] acts expeditiously to remove, or disable access to, the material;
4. [The ISP] does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
5. Upon notification of claimed infringement...[the ISP] responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

Attorney Adam R. Fox has written, “Critics opine that ISPs may act to comply with accusations so zealously that they threaten to engender a countervailing

¹⁸³ Fox, Adam R., *The Digital Millennium Copyright Act: Disabusing the Notion of a Constitutional Moment*, Rutgers Computer & Technology L.J. Vol. 27 (2001), citing Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Geo. L.J. 1833, 1888 (2000); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause and the First Amendment*, 17 Cardozo Arts & Ent. L.J. 47, 108-109 (1999).

¹⁸⁴ Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Georgetown Law Journal 1833, pg. 1878 (2000). Professor Yen wrote that the entire DMCA’s “cumbersome and disorganized structure makes its provisions difficult to untangle.”

infringement of the First Amendment rights of web page owners and ISP customers.”¹⁸⁵ Section 512 was designed to allow online service providers (or Internet service providers) the ability to avoid liability by removing copyright infringing material from their servers once they became aware of the infringing material. This arrangement requires the copyright owner to notify the ISP of the infringing material. That notification found at 512(c)(3)(A) must “substantially” comply with the following:

1. A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
2. Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
3. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
4. Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
5. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
6. A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.¹⁸⁶

However, in an interesting twist of the legislation, once the ISP has removed content in response to this notification, a counter-notification may be sent to the ISP claiming that, in fact, the material was *not* infringing. That notification must “substantially” include the following, as outlined in Section 512(g)(3):

¹⁸⁵ Fox, Adam R., *The Digital Millennium Copyright Act: Disabusing the Notion of a Constitutional*

1. A physical or electronic signature of the subscriber.
2. Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.
3. A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.
4. The subscriber's name, address, and telephone number, and jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.¹⁸⁷

Of concern is the notion that the ISP may employ a strong-arm tactic removing online material in an effort to avoid copyright infringement liability, and thereby squeeze the public's First Amendment privileges.¹⁸⁸ Alfred Yen, who has written numerous articles on copyright,¹⁸⁹ warned in regard to Section 512 of the DMCA, "to the extent that society cares about the free speech implications of copyright, the DMCA's safe harbors are problematic... Courts must not impute

Moment, Rutgers Computer & Technology L.J. Vol. 27 (2001), page 268.

¹⁸⁶ 17 U.S.C. § 512(c)(3)(A).

¹⁸⁷ 17 U.S.C. § 512(g)(3).

¹⁸⁸ See *supra* note 184.

¹⁸⁹ Alfred C. Yen, Associate Dean and Professor of Law at Boston College Law School, *A Personal Injury Law Perspective on Copyright in an Internet Age; A Preliminary Economic Analysis of Napster: Internet Technology, Copyright Liability, and the Possibility of Coasean Bargaining; Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment; Copyright Opinions and Aesthetic Theory; A Statistical Analysis of Asian American Experience in the Affirmative Action Hiring of Law Faculty; The Legacy of Feist: The Consequences of a Weak Connection Between Copyright and the Economics of Public Goods; When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law; Restoring the Natural Law: Copyright as Labor and Possession; A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel."*

knowledge to ISPs for purposes of contributory infringement unless it is quite clear that infringement has occurred. ISPs will otherwise respond by treating all complaints of infringements as actual infringements, overzealously enforcing copyright and depriving subscribers of their free speech rights.”¹⁹⁰

Yen made the argument that the DMCA itself will damage future litigation that would have served to strengthen existing law. He argues that the ambiguities within that existing law with regard to new technology would have been improved through case law, and a more equitable solution may have resulted, providing a better balance of copyright protection and free speech. Furthermore, Yen asserted that ISPs will be tempted to take self-preserving actions, removing questionable materials first, and asking questions later. Finally, Yen claims that by filing lawsuits, content providers can serve ISPs with a de facto temporary restraining order, in effect removing content indefinitely.¹⁹¹

¹⁹⁰ See *supra* note 184, pg. 51-52.

¹⁹¹ See *supra* note 184, pg. 52-53. “The DMCA’s safe harbor scheme creates First Amendment problems in three ways. First, it ossifies and perpetuates ambiguities in existing law that encourage ISPs to indiscriminately remove material from the Internet...A correct reading of contributory infringement exposes ISPs to liability only if the content provider’s complaint establishes a strong case for copyright infringement. However, existing ambiguities in the law are large enough to make risk averse ISPs behave more defensively than necessary. These ISPs will remove material from the Internet even if no strong case for infringement exists. If the DMCA did not exist, there would likely be future litigation in which courts could clarify and strengthen existing law, thereby reducing uncertainty and the need for ISPs to behave defensively. However, many ISPs will likely take advantage of the DMCA’s safe harbors, thereby reducing the chances that courts will have the opportunity to clarify and strengthen existing law. This will tend to make incentives for indiscriminate removal of material from the Internet a permanent feature of the legal landscape. “Second, the DMCA’s safe harbor scheme increases the incentive for indiscriminate removal of material by protecting ISPs from actions by their subscribers. As noted earlier, ISPs that remove a subscriber’s speech from the Internet run the small, but real, risk that the subscriber will sue. The DMCA operates by providing risk averse ISPs complete protection from this problem. As long as ISPs remove material upon the formal request of content providers and follow DMCA procedures, subscribers are barred from recovery. This makes removing contested material from the Internet even more attractive than it already is.

In one of the more notorious trials that tackled the language in Section 512, a handful of music companies sued Napster, Inc. for copyright infringement.¹⁹² Napster, a peer-to-peer Internet site, provided its users with the ability to post a list of their own music files online. Users can then browse other lists and download any music they like from another user's list. The Napster site facilitated this activity and a host of music companies, headlined by A&M Records, sued the site for copyright infringement.¹⁹³ During the trial, Napster argued, in part, that its liability for contributory and vicarious infringement was limited by the Digital Millennium Copyright Act, Section 512.¹⁹⁴ The court disagreed. "Napster attempts to persuade the court that subsection 512(d) provides an applicable safe harbor. However, this subsection expressly excludes from protection any defendant who has 'actual knowledge that the material or activity is infringing,' 512(d)(1)(A), or 'is aware of facts or circumstances from which infringing activity is apparent.'"¹⁹⁵

"Third, the DMCA's safe harbor scheme exacerbates the effect of any mistaken action against speech by effectively circumventing the procedures that would normally protect a copyright defendant from unjustified curtailment of her free speech rights. As noted earlier, subscribers can deny the existence of infringement and thereby prompt ISPs to restore disputed material to the Internet in not less than ten nor more than fourteen business days. However, if the content provider files suit and gives notice of the suit to the ISP before restoration occurs, the ISP must keep the disputed material off of the Internet in order to maintain its safe harbor. As a practical matter, a content provider need only file a lawsuit to get an alleged copyright infringement removed from the Internet pending the outcome of litigation. This is tantamount to awarding the content provider a temporary restraining order and preliminary injunction without any hearing before a court or the posting of a bond. Once again, if this happened only in clear cases of infringement, the First Amendment concerns might not be terribly large. However, ISPs will likely apply this very procedure to "statement of good faith" cases in which subscribers have not actually committed copyright infringement. Such a result is highly problematic because injunctions against speech are generally disfavored, especially before trial."

¹⁹² *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (2001).

¹⁹³ Plaintiffs in the trial included: A&M Records, Geffen Records, Interscope Records, Sony Music Entertainment, MCA Records, Atlantic Recording Corp., Island Records, Motown Record Co., and Capitol Records, Jerry Lieber Music, and Mike Stoller and Frank Music Corp.

¹⁹⁴ *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d at 919 n24 (2000). Use of the DMCA provision as a safe harbor was shot down. "This finding also puts to an end defendant's persist . . . attempts to invoke the protection of the Digital Millennium Copyright Act, 17 U.S.C., Section 512."

¹⁹⁵ *Ibid.*

But consider that Napster was not directly infringing the rights of the plaintiffs. That was uncontested.¹⁹⁶ What Napster supplied was a technological tool. When Universal City Studios sued Sony for its production and sale of VCRs, the plaintiff argued that Sony was liable for the copyright infringement committed by its consumers.¹⁹⁷ However, the court reasoned that a tool that had a significant technological use could not be outlawed because of the actions taken by some of the consumers who bought the tool.¹⁹⁸

Given a different circumstance, would another ISP err on the side of caution and remove material that *could* be infringing in an effort to take advantage of safe harbor protection from liability? Certainly the Napster case presents a rather obvious exploitation of copyright ownership, but that case law may now serve the interests of future cases, some of which could involve more tenuous infringement circumstances.

In another test of Section 512, a plaintiff sued an ISP for allowing a newsgroup to post copyrighted photographs on the ISP's server. ALS Scan was in the business of "creating and marketing 'adult' photographs."¹⁹⁹ RemarQ was an ISP and provided Internet access for two newsgroups that contained hundreds of postings that infringed ALS Scan's copyrights. ALS Scan wrote a "cease and desist" letter to RemarQ, asking the ISP to cease carrying the offending newsgroups. RemarQ refused ALS Scan's demands, but did respond by requesting that ALS Scan identify

¹⁹⁶ In *A&M Records v. Napster*, plaintiffs alleged that Napster was a "contributory and vicarious copyright infringer."

¹⁹⁷ See *supra* note 168.

¹⁹⁸ Copyright Law Professors in Support of Reversal, Amicus Curiae brief, Appeal Nos. 00-16401 and 00-16403, *Napster, Inc. v. A&M Records, Inc.* Consortium of 18 copyright law professors, including Jessica Litman, Wayne State University Law School, Alfred Yen, Boston College Law School, and Diane Zimmerman, New York University School of Law.

individual infringing items “with sufficient specificity” so that RemarQ could eliminate them.²⁰⁰ ALS Scan took RemarQ to court.

RemarQ’s defense centered on ALS Scan not providing proper notification of infringement, as prescribed in 512(c)(3)(A). “RemarQ argues in response that it did not have ‘knowledge of the infringing activity as a matter of law,’ stating that the DMCA protects it from liability because ‘ALS Scan failed to identify the infringing works in compliance with the Act, and RemarQ falls within the safe harbor provisions of the Act.’”

Furthermore, RemarQ argued that while some of the photographs on the newsgroup were copyright ALS Scan, others were not. So removal of the entire newsgroup also would have eliminated non-infringing activity. However, ALS Scan claimed the newsgroups served no other purpose than to distribute ALS Scan’s copyrighted materials, and therefore, by directing RemarQ to the site, it had also directed RemarQ to a representative list of infringing materials. The court agreed, saying “ALS Scan provided RemarQ with information that (1) identified two sites created for the sole purpose of publishing ALS Scan’s copyrighted works, (2) asserted that virtually all the images at the two sites were its copyrighted material, and (3) referred RemarQ to two web addresses where RemarQ could find pictures of ALS Scan’s models and obtain ALS Scan’s copyright information.”²⁰¹

Again, Alfred Yen’s warning applies. In *ALS Scan v. RemarQ*, even a notification that did not meet the requirements of the DMCA was sufficient to remove

¹⁹⁹ *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F. 3d 619 (2001).

²⁰⁰ *Ibid*, at 1 n5.

²⁰¹ *Ibid*, at 111 n20.

safe harbor from the ISP. Would, therefore, an ISP become more zealous in its effort to remove any potentially infringing material in an effort to avoid liability?

America Online also entered the 512 fray when it came under fire for hosting pages that contained illegal copies of author Harlan Ellison's work.²⁰² AOL invoked Section 512 when it claimed safe harbor under 512(a), "a service provider shall not be liable for monetary relief...by reason of ...transmitting, routing, or providing connections for, material through a system or network..." and 512(c), "a service provider shall not be liable for monetary relief...by reason of the storage at the direction of a user of material that resides on a system or network..." On the contrary, the plaintiffs invoked a 512 clause of their own. In a strategic move, the plaintiffs attempted to turn the defense's law back on itself. A specific provision within 512 seemed to undermine qualification for safe harbor. Under 512(i), "all safe-harbor provisions established by the DMCA shall apply to a service provider only if the service provider:"

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and (B) accommodates and does not interfere with standard technical measures.

In essence, the *Ellison* team argued that because AOL did not give a warning as prescribed in 512(i), then AOL could not take advantage of safe harbor. The U.S. District Court of Central California relied on the DMCA's legislative history

²⁰² *Ellison v. Robertson*, 189 F. Supp. 2d 1051; U.S. Dist. LEXIS 4166; 62 U.S.P. Q.2D (BNA) 1170 (2002). "Plaintiff Harlan Ellison is the author of many works of fact and fiction, particularly science

regarding 512(i) to determine if a lack of proper warning to repeat offenders was cause for eliminating safe harbor provisions:

The committee [is not] suggesting that a provider *must investigate possible infringements, monitor its service, or make difficult judgements as to whether conduct is or is not infringing*. However, those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.²⁰³

“In the face of such clear guidance from the legislative history of the DMCA, subsection (i) cannot be interpreted to require ISPs to take affirmative steps to investigate potential infringement and set up notification procedures in an attempt to identify the responsible individuals.”²⁰⁴ The warning spelled out in 512(i) could be interpreted as a requirement of the ISP to actively police its contents. However, the court’s ruling seems to contradict that reading. The legislative history clearly did not require the ISP to actively seek out repeat infringers, and yet subsection (i) requires the ISP to post a warning to repeat infringers, threatening the loss of their subscriptions.

A final twist to Section 512 involves a potentially harmful contradiction. A reading of Section 512(c)(1)(C) seems to exonerate ISPs from liability given “expeditious” removal of infringing material, or disabling of access to that material. However, Section 512(c)(1)(B) says an ISP shall not be liable if the ISP “does not receive a financial benefit directly attributable to the infringing activity, *in a case in*

fiction.” [America Online, RemarQ Communities, Critical Path, and Citizen 513 were also named as defendants and charges were dropped against all but AOL before the case came to trial.]

²⁰³ H.R. Rep. 105-551P.II. at pg. 61 (July 22, 1998).

²⁰⁴ See *supra* note 202, at n14.

which the service provider has the right and ability to control such activity...”²⁰⁵ So the ISP is faced with a potential catch-22. When a copyright owner informs an ISP of infringing material, the ISP must remove or disable access to that material in order to comply with Section 512(c)(1)(C). However, if the ISP removes or disables access to the material, then the ISP shows that it does in fact have “the right and ability to control such activity,” a provision that abolishes an ISP’s claim on safe harbor at Section 512(c)(1)(B). Granted, the provision under 512(c)(1)(B) applies only to ISPs receiving financial benefit from the activity. However, in future challenges, that requirement may sometimes be an actual direct benefit, or financial benefit could be proven by demonstrating increased activity to a particular portion of the ISP’s content—thereby driving membership and advertising revenue.

The *Ellison v. Robertson* court approached this subject in some detail, relying heavily on an earlier decision, *Hendrickson v. eBay* for guidance.²⁰⁶ In that decision, a web user had posted an advertisement for selling copies of a movie entitled *Manson* on the Internet site eBay—an auction web site where users are able to buy and sell goods by posting messages about goods for sale. Buyers bid on the goods and the highest bidder is awarded the sale. In the *Hendrickson* case, the defendant, Robert Hendrickson, claimed he owned the copyright for the movie *Manson*, and the copies being offered for sale were pirated, and therefore because eBay was hosting the transaction, eBay was contributing to copyright infringement.²⁰⁷ Under the DMCA

²⁰⁵ 17 § 512(c)(1)(B), emphasis added.

²⁰⁶ *Hendrickson v. eBay*, 165 F. Supp. 2d 1082 (2001).

²⁰⁷ *Ibid.*

Section 512(c)(1), eBay was exonerated because Hendrickson had not followed DMCA protocol in notifying eBay of the infringement.²⁰⁸

The *Ellison* court cited the eBay decision regarding 512. “The court reasoned that because the DMCA specifically requires ISPs to remove or block access to infringing materials in order to avail themselves of the limitation on liability found in subsection 512(c), the ‘right and ability to control’ must mean something more than the ability to delete or block access to infringing materials after the fact. Otherwise, ‘a service provider’ loses immunity under the safe-harbor provision of the DMCA because it engages in acts that are specifically required by the DMCA.”²⁰⁹ The *Ellison* court felt that Congress would surely not write two subsections that clearly pit themselves against one another. Instead, the *Ellison* court reasoned, “the DMCA requires more than the mere ability to delete and block access to infringing material after that material has been posted in order for the ISP to be said to have ‘the right and ability to control such activity.’”²¹⁰ In deciding the 512 issue:

“...AOL had no...ability to go after Robertson personally here [by contrast to Netcom’s ability to go after Erlich in the *Religious Technology Center v. Netcom* case]. Rather, it found itself in the same situation as every other ISP in the world that had entered into peer agreements... It could delete or block users’ access to the infringing postings, but it could not do anything to restrict the infringing activity at the root level.

²⁰⁸ *Ibid.* See also, www.kentlaw.edu/student_orgs/jip/copy/Hendrickson.htm [last visited April 9, 2003].

“The Court specifically found that Plaintiff’s notice to eBay in form of e-mail or telephonic conversations were defective because they did not have a proper signature; despite requests by eBay, they did not specifically identify the material by number; and the e-mails from Plaintiff did not have the required statements of good faith and representation of accuracy under penalty of perjury.”

²⁰⁹ See *supra* note 202, at 1.

²¹⁰ See *supra* note 202, at 1.

“The Court holds that AOL’s ability to delete or block access to Robertson’s postings of infringing material after those postings had already found their way onto AOL’s USENET servers was insufficient to constitute ‘the right and ability to control infringing activity’ as the term is used in the context of vicarious copyright infringement.”²¹¹

It is worth noting, that the *Ellison* court found that AOL “could not do anything to restrict the infringing activity at the root level” of a peer agreement—a similar agreement once found at Napster.com, who was ruled quite capable of restricting infringing activity.²¹² The somewhat murky finding in the *Ellison* case did not give ISPs reason to breath easy. Had Ellison shown that AOL had financially benefited from the infringing activity, AOL may have been found liable under Section 512. That close call may add to an ISP’s liability fears. Such a state of concern could intensify and broaden an ISP’s efforts to comply with the super-cautious readings of Section 512 of the DMCA. Self-censorship to avoid the specter of liability for copyright infringement could result in the removal of non-infringing material from web sites.

²¹¹ See *supra* note 202, at 1.

²¹² See *supra* note 192.

Chapter VI: Conclusion

In an effort to meet the coming technological advancements and threats presented most prominently by the Internet, Congress responded with the Digital Millennium Copyright Act. Since its inception, it has come under fairly significant criticism, as this thesis has noted. The impetus for creating this legislation was the result of the same fear of piracy that Noah Webster had in the 1780s when he wrote his English primer.

The fear of digital piracy is certainly not unfounded. Copyright industries have reported astonishing losses. U.S. Deputy Assistant Attorney General John Malcolm, who is in charge of the Computer Crimes and Intellectual Property Section of the Department of Justice (CCIPS) said in 2002 that “U.S. copyright industries reported losses of nearly \$22 billion dollars due to overseas piracy. After 10 years growth, global music sales declined in 2001 by 5 percent, and are down even more this year, largely due to software piracy.”²¹³

It is unknown how Malcolm or anyone else is arriving at any reliable figures for the cost of piracy. Total music sales were down 5 percent, but the question of why those sales were down likely has a complicated answer, affected by a combination of variables in the market. But regardless of the accuracy of the data, there has been—at the very least—a perception of rampant piracy.

²¹³ Malcolm, John, Deputy Assistant Attorney General, in a speech entitled *Importance of IP to American Economy*, presented for the Progress and Freedom Foundation in Aspen, Colorado (August 20, 2002), www.techlawjournal.com/intelpro/20020819.asp [last visited March 31, 2003].

“Twenty-three percent of respondents said that they are not buying more music because they can download it or copy it for free on the Internet,” said Hilary Rosen, president of the Recording Industry Association of America, citing research the RIAA commissioned.²¹⁴ “Over 50 percent of respondents who downloaded free music said that they made copies of it as well.”²¹⁵ “According to industry estimates, over 2.6 billion music files are downloaded illegally every month,” reported the British Broadcasting Corporation.²¹⁶

Be it accurate or exaggerated, this piracy resulted in the 1998 DMCA, which five years later was at the center of a copyright debate, and had earned more than its fair share of controversy. The stated purpose of the law, and the actual outcome of the law may be at odds. Tom Bliley (R-VA) said during the House floor debate on H.R. 2281, August 4, 1998, “Copyright law is not just about protecting information. It’s just as much about affording reasonable access to it as a means of keeping our democracy healthy and doing what the Constitution says copyright law is all about: promoting ‘Progress in Science and the useful Arts.’ If this bill ceases to strike that balance, it will no longer deserve Congress’ or the public’s support.”²¹⁷ However, the desirability of preserving that balance in achieving the spirit of copyright is questioned in at least two of the DMCA’s provisions, Title I, Section 1201, and Title II, Section 512.

²¹⁴ Pruitt, Scarlet, *Online Piracy Blamed for Drop in CD Sales* (February 25, 2002), www.pcworld.com/news/article/O.aid,86326.00.asp, [last visited March 31, 2003].

²¹⁵ *Ibid.*

²¹⁶ *Spears Warns Against Piracy* (September 26, 2002), news.bbc.co.uk/1/hi/entertainment/music/2283072.stm, [last visited March 31, 2003].

²¹⁷ Bliley, Tom, (R-VA) House floor debate on H.R. 2281, the Digital Millennium Copyright Act (August 4, 1998).

The anti-circumvention provision, Section 1201, was written, in part, to give copyright owners protection from piracy. Without protection, “the owners of intellectual property are going to be unwilling to put their material online.”²¹⁸ But even in the DMCA’s legislative gestation period, Congress recognized the need to address balance and to fortify fair use. “This bill makes sure that libraries acting in good faith can never be subject to fines or civil damages. Specifically, a library is exempt from monetary liability in a civil suit if it was not aware and had no reason to believe that its acts constituted a violation.”²¹⁹

While these qualifications seem to exempt librarians and other fair users from liability, it does nothing to provide access for librarians and fair users to the protected material. The original quandary was two-pronged, but Congress’ solution is one-pronged. The copyright owners sought protection from piracy. The fair users sought continuation of free access to material for non-infringing uses. The nature of the debate ensures that nearly any solution will utterly fail to satisfy both needs. It is a problem that requires each side of the debate to yield some territory. However, the DMCA fails to strike balance by insuring fair users are provided with copyright protection that affords access to digital information.

Section 1201 contains flawed language that fails to adequately address fair use and a proper definition of circumvention. Section 1201 makes unauthorized access of copyrighted information illegal. It does not address, however, what is done with the information once access it is accomplished. In other words, Section 1201 is much like

²¹⁸ Leahy, Patrick, (D-VT) Senate floor debate on Senate version of the bill S. 2037, the Digital Millennium Copyright Act (May 6, 1998).

²¹⁹ *Ibid.*

a breaking-and-entering provision. Again, under the DMCA Section 1201, it is illegal to break into a room, but once you're in the room, Section 1201 does not address what you do with the information inside the room. Therefore, as attorney and intellectual property law specialist Gary Shapiro noted during his testimony before the House, "the acts prohibited by [the DMCA's] terms are not tied to infringement of copyrights."²²⁰

The Digital Millennium Copyright Act did not legislate copyright law. It did legislate access to copyrighted material. And to the dismay of fair users, by and large the DMCA reduces free access to information on the Internet. That reduction is a result of Congress trying to find level—achieving copyright balance between encouragement of creativity and freedom of access to information.

Perhaps Section 1201 would have been better written had it allowed for circumvention of security devices specifically for non-infringing users, as Shapiro recommended. That seemingly subtle difference would have persuaded courts to consider fair use when evaluating anti-circumvention circumstances. As it stands, the DMCA anti-circumvention provision is rather like having legislation against murder with no self-defense provision.

Still, allowing circumvention for the purposes of non-infringing activity would require copyright owners to police their users regularly and ascertain each user's intent. Even then, copyright owners would be at the mercy of their consumers' honesty. Once a digital copy is made, it can be made again ad infinitum with virtually

²²⁰ See *supra* note 81. Shapiro, Gary J., Hearing on H.R. 2281 before the House Subcommittee on Telecommunications, Trade, and Consumer Protection (June 5, 1998).

no quality degradation. So even one scofflaw could cause considerable harm to a copyright owner.

One critic of the claims regarding online piracy suggests that the Internet and digital revolution are *not* damaging to copyright owners, but simply change the business model. Perhaps musicians, for example, can no longer expect to make millions of dollars on CD sales. Instead, other avenues of income must be exploited—concert sales, T-shirt sales, advertising, etc.²²¹ “Trading and online piracy is probably the greatest challenge facing Variety.com’s industry—the entertainment business—today, but the question for us is not ‘how can we stop this?’ Instead, it’s ‘how can we take advantage of this?’”²²² For now, online piracy has resulted in the copyright industries demanding action. And it is easy for Congress to understand the plight of the copyright owner. What is perhaps more difficult to accept, is the association of the ‘progress of Science and useful Arts’ with the free access of information. Just as copyright protection encourages creative thought, it must not be permitted to hang the fruit of that creativity from branches that no one can reach.

Finally, the definition of circumvention leaves the real possibility of hampering legitimate technological designs. According to the DMCA, circumvention means “avoiding, bypassing, removing, deactivating, or...impairing” a technological measure.²²³ Any device, therefore, that does not respond to a security measure is, in effect, avoiding or bypassing a technological measure. This seems to create an

²²¹ Smith, Travis, Editor, Variety.com. in comments regarding online piracy (May 1, 2001). foliomag.com/ar/marketing_online_piracy.

²²² *Ibid.*

²²³ 17 U.S.C § 1201(b)(1)(A).

electronic designers' nightmare, adapting all designs to all potential security systems, no matter how obscure or outdated.

If the debate regarding Section 1201 easily translates into an abstract comparison between copyright ownership versus freedom of information, then Section 512, the limited liability provision, is a far more complicated study of that comparison. In 512, the DMCA provided liability protection to Internet service providers, often credited with blazing the Internet frontier. "The notion that service providers should not bear the responsibility for copyright infringements when they are solely transmitting the material is one key to the future growth of the Internet," said Senator Ashcroft.²²⁴

So in effort to encourage the growth of the Internet, Congress enacted bold legislation to alleviate liability concerns for innocent service providers potentially caught in copyright crossfires. Section 512 sets up a detailed checklist of steps to take when copyright infringement has taken place. There are distinct steps outlined for the copyright owner, the ISP, and even the users of information who believe they have unjustly lost access to information.

While Congress spoke regularly of protecting ISPs (and OSPs—online service providers) from liability, crediting such services with responsibility for the growth of the Internet, perhaps they targeted ISPs as easy-to-reach agents of innumerable Internet users, otherwise known only by lifeless IP addresses and cryptic usernames. When a copyright owner or an agent of that owner found copyrighted material

²²⁴ Senator John Ashcroft (R-MO), Senate floor debate on S. 2037, the Digital Millennium Copyright Act (May 14, 1998).

available on the Internet, what recourse did that person have?²²⁵ Often the only available agent was the ISP, and purposefully, that is what the DMCA focuses upon.

If a user finds illegally posted copyrighted material on the Internet, that user can send a letter of copyright proof to the ISP requesting that the offending material be removed or access to it disabled. Upon the ISP's removing the material, another user may send a counter letter to the ISP claiming that the material was removed improperly, and should be reinstated.²²⁶

Critics of 512 have claimed a general tendency by courts to find in favor of the copyright complainant, risking, they say, the likelihood that ISPs will become squeamish in regard to the presence of questionable online material.²²⁷ After all, the critics argue, if an ISP defaults by removing material in question, then the ISP can take advantage of the safe harbor provision. So, ISPs will always err on the side of playing it safe by removing material—meaning less material available for the Internet user.

But the *Ellison* case, discussed in Chapter IV, brings doubt to the ISP's eligibility for safe harbor. In a contradictory pair of provisions, Section 512 seems to

²²⁵ See Floor statements accompanying introduction of S. 1121, WIPO Copyright and Performances and Phonograms Treaty Implementation Act (July 29, 1997); Hearing on H.R. 2281 and H.R. 2180 before the House Subcommittee on Courts and Intellectual Property (September 16 and 17, 1997); H. Rept. 105-551, P.I. Report of the House Judiciary Committee on H.R. 2281, WIPO Copyright Treaty Implementation Act (May 22, 1998); Senate floor debate on Senate version of the bill, S. 2037, the Digital Millennium Copyright Act (May 14, 1998); H. Rept. 105-551 P.II, Report of House Commerce Committee on H.R. 2281, the Digital Millennium Copyright Act (July 22, 1998); House floor debate on H.R. 2281, the Digital Millennium Copyright Act (August 4, 1998).

²²⁶ 17 U.S.C. § 512.

²²⁷ Yen, Alfred C., *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Geo. L.J. 1833, 1888 (2000); Fox, Adam R., *The Digital Millennium Copyright Act: Disabusing the Notion of a Constitutional Moment*, Rutgers Computer & Technology L.J. Vol. 27 (2001); Brannan, Anna Claveria, *Fair Use Doctrine and the Digital Millennium Copyright Act: Does Fair Use Exist under the DMCA?*, Santa Clara Law Review, Vol. 42, No. 1 (2001).

require an ISP to remove copyrighted material, and at the same time an ISP must claim the inability to control the material.²²⁸ This language certainly leaves room for interpretation, and at least one critic claims the provision violates the First Amendment. Attorney Adam Fox argued that if ISPs are encouraged to seek protection from 512's safe harbor, then ISPs may become more aggressive in removing content—even at the cost of removing content that is not actually infringing.²²⁹ Thus, public access is diminished by overzealous ISPs.

In building a safe harbor, Congress may have also built disinterested agents who have little regard for First Amendment rights to information. Certainly ISPs will seek to protect themselves from litigation. But the DMCA provides for ISPs a “get-out-of-jail-free” card by simply removing any questioned content. It is natural to assume that the ISP's interest in avoiding liability will become more acute, and the avoidance of copyright infringement liability will virtually mandate a standard policy for removal.

Meanwhile the freedom of the Internet may suffer from a private police force built by the DMCA. “[T]he government has arguably transformed [ISPs] into quasi-administrative bodies, with unelected decisionmakers who are answerable only to their shareholders.”²³⁰ The question remains how much copyright information will be banished from the Internet as a result of ISP prudence.

In terms of damage to the spirit of copyright, this thesis finds criticism of Section 512 less compelling than that of Section 1201. (However, this thesis is in full agreement with all criticism of Section 512's dismal construction of language.)

²²⁸ 17 U.S.C. § 512(c)(1)(C) and (c)(1)(B).

²²⁹ *See supra* note 183.

²³⁰ *See supra* note 185.

Section 512 seeks to protect ISPs as innocents to be shielded from swarms of litigation rather than as purveyors of infringement. The criticism assumes the ISPs will become more active in their removal of questionable content. While the safe harbor provision certainly entices ISPs to do just that, the market will also entice the ISPs to leave material online. In the end, the ISPs serve the market, and they are checked and balanced by their competition. Overzealous removal of content will force users to another ISP.

On the other hand, the empowering of the ISP to control material is a troubling consequence of Section 512. The ISP becomes the judge in a non-jury trial. And unless formal action is taken, the ISP is the ultimate arbiter of the inclusion or deletion of material.

A. For Further Study

While the Internet is recognized as a device that can make copyright infringement vastly easier, it is also a device that can make copyright policing far easier. By employing the Internet, copyright owners are equipped with the tools necessary to quickly conduct a search for their material all over the world. Never before have copyright owners had the ability to keep tabs on the use of their own work.

And while Congress busily improves copyright protection to meet the challenges of new technology, one wonders if copyright protection has become so invasive that the public has lost its ability to properly use the material. In *U.S. v. Elcomsoft*, Adobe systems built an electronic book reader that also had the capability

of using an electronic voice to “read” the book out loud.²³¹ The software worked with eBook files that users could purchase, and the consumers could pay extra for the read-out-loud feature. Dmitry Sklyarov, a Russian computer programmer, developed software that cracked Adobe’s book reader program, allowing users to access the read-out-loud feature on any book.

Beyond the DMCA issues that this case involves, future study might look at the invasive ability that copyright owners have to control the use of a document after sale. This new ability for copyright owners to control the use of their work bumps up against the “First Sale” doctrine. When consumers bought an ordinary book in the past, copyright certainly did not have the power to prevent the buyer from reading the book aloud.

Similarly, software programs, music files, and even electronic pictures could be built with internal technology that detects how it is being used, preventing “unauthorized” use such as giving music away to friends, sharing a book, selling software, or even manipulating a photograph.

The First Sale doctrine, Section 106 of the 1976 Copyright Act, permits a buyer of copyrighted material “without the authority of the Copyright Owner, to sell or otherwise dispose of the possession of that phonorecord.” The increased capability of copyright owners to control their work, even after first sale, compels Congress to re-examine this code in light of technological advancements.

In addition, the DMCA may raise privacy concerns. As discussed in this thesis, the “safe harbor” provision in the DMCA’s Section 512 allows ISPs to avoid

²³¹ See *supra*, note 91.

copyright liability by removing content from availability when a proper claim is made about the copyright ownership of that content. But of particular concern, Section 512(h) says, “A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.”²³² This subpoena would not require the copyright owner to file a lawsuit. If copyright owners find protected work on an ISP, they can not only request that the ISP remove the content, but also demand that the ISP release the identity of the people who posted the content, without the need for the expensive discovery phase of a lawsuit.

Similar to the conflict between Wal-Mart and FatWallet,²³³ the Recording Industry Association of America found copyrighted content on the ISP “Verizon.” Invoking the DMCA Section 512, the RIAA asked Verizon to remove the content and to reveal the identity of the subscriber who posted the content in the first place. “Verizon argued that the shortcut was meant to apply to only a narrow set of circumstances and that its broad use would violate subscribers’ privacy and due process rights.”²³⁴ However, Judge John D. Bates of the Federal District Court in Washington disagreed, and ordered Verizon to reveal the identity of the subscriber. “[The ruling] opens the door for anyone who makes a mere allegation of copyright infringement to gain complete access to private subscriber information without the

²³² 17 U.S.C. § 512(h).

²³³ See discussion at note 120.

²³⁴ Harmon, Amy, *Verizon Ordered to Give Identity of Net Subscriber*, The New York Times, page C1 (January 22, 2003).

due process protections afforded by the courts,” said Sara Deutsch, vice president and associate general counsel for Verizon.²³⁵

Additional study of the DMCA may include conducting a qualitative survey of webmasters, analyzing their business practices in relation to the DMCA subsections discussed here. Are webmasters inclined to remove content that may be copyright protected? Is material removed with more regularity due to the DMCA’s influence? In addition, what changes have ISPs made to their posted policies to conform with not only the DMCA, but also the case law that has resulted from it?

The study might also include an analysis of copyright security devices. Are these devices being used more frequently? Are fair users gaining access? How are libraries and other researchers gaining access to this copyrighted information? Is the DMCA’s required two-year study on the effect of Section 1201 causing improvement in the Act?

²³⁵ *Ibid.*

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Vita

Now serving as a director of communications for a southeastern manufacturing company, Robert Wilton Fox completed an M.S. in communications from the University of Tennessee, Knoxville in May of 2003. After earning a B.S. in journalism from Ohio University in 1991, he began a career in communications that has included work in newspaper editorial, advertising, public relations, marketing and technical writing. In 1995, he began communications work on the Internet, developing web site communications for an East Tennessee engineering company. After acquiring additional web skills, he went on to develop web communications and e-commerce strategy for a large midwestern manufacturing company. In developing these skills, copyright became an important professional and academic interest. Robert now lives in Knoxville, TN with his wife Darcy, twins Masey and Braxton, and newborn daughter, Julianne.

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